

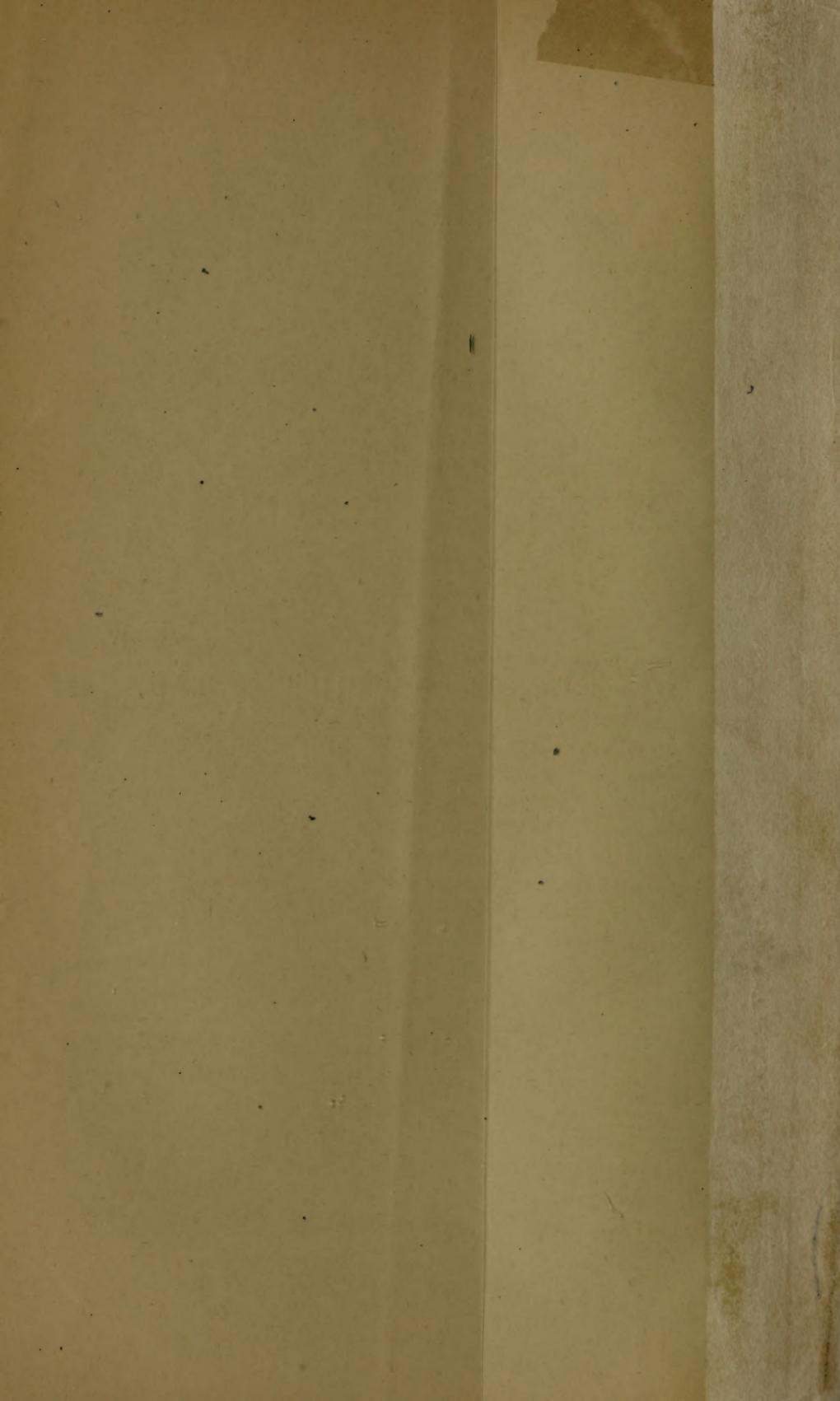
154

HALIFAX COMMISSION.

ARGUMENT OF MR. DWIGHT FOSTER,

ON BEHALF OF THE UNITED STATES.

1877



1828

ARGUMENT OF MR. DWIGHT FOSTER, ON BEHALF OF THE UNITED STATES.

Gentlemen of the Commission:— It becomes my duty to open the discussion of this voluminous mass of evidence, which has occupied your attention through so many weeks. It is a satisfaction to know that many topics, as to which numerous witnesses testified, and over which much time has been consumed, have been eliminated from the investigation, so that they need not occupy the time of counsel in argument, as they are sure not to give any trouble to the Commissioners in arriving at their verdict. The decision of the Commission, made on the 6th of September, by which it was held not to be competent for this tribunal to award compensation for commercial intercourse between the two countries, or for purchasing bait, ice, supplies, &c., or for permission to trans-ship cargoes in British waters, is based upon the principle — the obvious principle, perhaps I may properly say — that no award can be made by this tribunal against the United States, except for rights which they acquire under the Treaty; so that, for the period of twelve years, they belong to our citizens, and cannot be taken from them. For advantages conferred by the Treaty, as vested rights, you are empowered to make an award, and for nothing else.

The question before you is whether the privileges accorded the

citizens of the United States by the Treaty of Washington are of greater value than those accorded to the subjects of Her Britannic Majesty, and, if so, how much is the difference, in money? The concessions made by each government to the other in the Treaty were freely and voluntarily made. If it should turn out (as I do not suppose it will), that in any respect the making of those concessions has been injurious to the subjects of Her Majesty, you are not on that account to render an award of damages against the United States. The two governments decided that they would grant certain privileges to the citizens of one and the subjects of the other. Whether those privileges may be detrimental to the party by whom they have been conceded is no concern of ours. That was disposed of when the Treaty was made. Our case before this tribunal is a case, not of damages, but of an adjustment of equivalents between concessions freely made on the one side and on the other. It follows from this consideration, gentlemen, that all that part of the testimony which has been devoted to showing that possibly, under certain circumstances, American fishermen, either in the exercise of their Treaty rights, or in trespassing beyond their rights, may have done injury to the fishing grounds, or to the people of the Provinces, is wholly aside from the subject-matter submitted for your decision. The question whether throwing over gurry hurts fishing grounds, — the question whether vessels lee-bow boats, — and all matters of that sort, which at an early period of the investigation loomed up occasionally as if they might have some importance, — may be dismissed from our minds; for, whether the claims made in that respect are well founded or not, no authority has been vested in this tribunal to make an award based upon any such grounds. That which you have been empowered to decide is the question, to what extent the citizens of the United States are gainers by having, for the term of twelve years, liberty to take fish on the shores and coasts of Her Majesty's dominions, without being restricted to any distance from the land. It is the right of inshore fishing; in other words, the removal of a restriction by which our fishermen were forbidden to come within three miles of the shore for fishing purposes; and that is all. No rights to do any thing upon the land are conferred upon the citizens of the United States, under this Treaty, with the single exception of the right to dry nets and cure fish on the shores of the Magdalen Islands, if we did not possess

that before. No right to land for the purpose of seining from the shore; no right to the "strand fishery," as it has been called; no right to do any thing except, water-borne on our vessels, to go within the limits which had been previously forbidden.

When I commenced the investigation of this question, I supposed that it was probable that an important question of international law would turn out to be involved in it, relative, of course, to the so-called headland question, which has been the subject of so much discussion between the two governments for a long series of years; but the evidence that has been introduced renders this question not of the slightest importance, and inasmuch as it is a question which you are not empowered, except incidentally, to decide, a question eminently proper to be passed upon between the governments directly, I presume you will rejoice with me in finding that it is not practically before us, and that we need not trouble ourselves concerning it. If it had appeared in this case that there was fishing carried on to any appreciable extent within the large bays, more than six miles wide at the headlands, and at a distance of more than three miles from the contour of the shores of those bays, the United States would have contended that their citizens, in common with all the rest of mankind, were entitled to fish in such great bodies of water as long as they kept themselves more than three miles from the shore. In short, they would have contended, as it has been contended in the brief filed in this case, that where the bays are more than six miles in width, from headland to headland, they are to be treated in this respect, for fishing purposes, as parts of the open sea; but the evidence, as I said before, has eliminated all that matter from the inquiry. The only bodies of water as to which any such question can arise are, in the first place, the Bay of Fundy. Now, the right of American fishermen to enter and fish in that bay was decided by arbitration in the case of the schooner *Washington*, and Her Majesty's government have uniformly acquiesced in that decision. So, as to that body of water, the rights of the citizens of the United States must be regarded as *res adjudicata*. In addition, however, it turns out, that within the body of the Bay of Fundy there has not been any fishing more than three miles from the shore for a period of many years. One of the British witnesses said that it was forty years since the mackerel fishery ceased in the Bay of Fundy. At all events, there is no evidence in this case of fishing of any descrip-

tion in the body of the Bay of Fundy more than three miles from the shore, and this fact, in addition to the decision in the *Washington* case, disposes of that.

The next body of water is the Bay of Miramichi ; as to which it will turn out by an inspection of the map on which the Commissioners, appointed under the Reciprocity Treaty, marked out the lines reserved from free fishing, on the ground that they were mouths of rivers, that the mouth of the River Miramichi comes almost down to the headlands of the bay. You will remember that the report of the Commission on the Reciprocity Treaty is referred to in the Treaty of Washington, and that the same places excluded by their decision remain excluded now. What is left ? The narrow space below the point marked out as the mouth of the River Miramichi, and within the headlands of the bay, is so small that there can be no fishing there of any consequence, and no evidence of any fishing there at all has been introduced. So far as the Bay of Miramichi goes, therefore, I cannot see that the headland question need trouble you at all.

Then comes the Bay of Chaleurs, and in the Bay of Chaleurs, whatever fishing has been found to exist seems to have been within three miles of the shores of the bay, in the body of the Bay of Chaleurs. I am not aware of any evidence of fishing, and it is very curious that this Bay of Chaleurs, about which there has been so much controversy heretofore, can be so summarily dismissed from the present investigation. I suppose that a great deal of factitious importance has been given to the Bay of Chaleurs from the custom among fishermen, and almost universal a generation ago, of which we have heard so much, to speak of the whole of the Gulf of St. Lawrence by that term. Over and over again, and particularly among the older witnesses, we have noticed that when they spoke of going to the Gulf of St. Lawrence, they spoke of it by the term " Bay of Chaleurs ; " but in the Bay of Chaleurs proper, in the body of the bay, I cannot find any evidence of any fishing at all. I think, therefore, that the Bay of Chaleurs may be dismissed from our consideration.

There are two or three other bodies of water as to which a possible theoretical question may be raised, but their names have not been introduced into the testimony on this occasion, from first to last. The headland question, therefore, gentlemen, I believe may be dismissed as, for the purpose of this inquiry, wholly unimpor-

tant; and although I am not authorized to speak for my friend, the British agent, and to say that he concurs with me, yet I shall be very much surprised if I find any different views from those that I have expressed taken on the other side. If in argument other views should be brought forward, or if it should seem to your Honors, in considering the subject, that the question has an importance which it has not in my view, then I can only refer you to the brief that has been filed, and insist upon the principles which the United States have heretofore maintained on that subject. For the present, I congratulate you, as I do myself, that no grave and vexed question of international law need trouble you in coming to a conclusion.

I think it is necessary to go somewhat, yet briefly, into the historical aspects of the fishery question, in order to see whether that which has been the subject of diplomatic controversy and of public feeling in the past is really the same thing which we have under discussion to-day. The question has been asked, and asked with some earnestness, by my friends on the other side, "If the inshore fisheries have the little importance which you say they have, why do your fishermen go to the Gulf of St. Lawrence at all?" And again, it has been asked, "If the inshore fisheries are of such insignificant consequence, why is it that the fishermen and people of the United States have always manifested such a feverish anxiety on the subject?" Those questions deserve an answer, and unless an answer can be made, you undoubtedly will feel that there must be some unseen importance in this question, or there would not have been all the trouble with reference to it heretofore. Why do the fishermen of the United States come to the Gulf of St. Lawrence at all? Why should they not come here? What men on the face of the earth have a better right to plough with their keels the waters of the Gulf of St. Lawrence than the descendants of the fishermen of New England, to whose energy and bravery, a century and a quarter ago, it is chiefly owing that there is any Nova Scotia to-day under the British flag? I am not going to dwell upon the history of the subject. It is well known that it was New England that saved to the crown of England these maritime provinces; that to New England fishermen is due the fact that the flag of Great Britain flies on the citadel, and not the flag of France, to-day.

Early in the diplomatic history of this case, we find that the

Treaty of Paris, in 1763, excluded French fishermen three leagues from the coast belonging to Great Britain in the Gulf of St. Lawrence, and fifteen leagues from the island of Cape Breton. We find that the treaty with Spain, in the same year, contained a relinquishment of all Spanish fishing rights in the neighborhood of Newfoundland. The crown of Spain expressly desisted from all pretensions to the right of fishing in the neighborhood of Newfoundland. Those are the two treaties of 1763,—the treaty of Paris with France, and the treaty with Spain. Obviously, at that time, Great Britain claimed for herself exclusive sovereignty over the whole Gulf of St. Lawrence, and over a large part of the adjacent seas. By the Treaty of Versailles, in 1783, substantially the same provisions of exclusion were made with reference to the French fishermen. Now, in that broad claim of jurisdiction over the adjacent seas, in the right asserted and maintained to have British subjects fish there exclusively, the fishermen of New England, as British subjects, shared. Undoubtedly, the pretensions that were yielded to by those treaties have long since disappeared. Nobody believes now that Great Britain has any exclusive jurisdiction over the Gulf of St. Lawrence, or the Banks of Newfoundland, but at the time when the United States asserted their independence, and when the treaty was formed between the United States and Great Britain, such were the claims of England, and those claims had been acquiesced in by France and by Spain. That explains the reason why it was that the elder Adams said he would rather cut off his right hand than give up the fisheries at the time the treaty was formed, in 1783; and that explains the reason why, when his son, John Quincy Adams, was one of the Commissioners who negotiated the Treaty of Ghent, at the end of the war of 1812, he insisted so strenuously that nothing should be done to give away the rights of the citizens of the United States in these ocean fisheries. Those are the fisheries which existed in that day, and those alone. The mackerel fishery was unknown. It was the cod fishery and the whale fishery that called forth the eulogy of Burke, over a hundred years ago. It was the cod fishery and the whale fishery for which the first and second Adams so strenuously contended; and inasmuch as it was found impossible in the treaty at the end of the war of 1812 to come to any adjustment of the fishery question, all mention of it was omitted in the treaty; the treaty was made leaving each

party to assert his claims at some future time. And so it stood, Great Britain having given notice that she did not intend to renew the rights and privileges conceded to the United States in the treaty of 1783, and the United States giving notice that they regarded the privileges of the treaty of 1783 as of a permanent character, and not terminated by the war of 1812; but no conclusion was arrived at between the parties. What followed? The best account of the controversy to be found is in a book called "The Fisheries and the Mississippi," which contains John Quincy Adams' letters on the subject of the Treaty of Ghent, and the Convention of 1818. Mr. Adams in that book says that the year after peace was declared, British cruisers warned all American fishing vessels not to approach within sixty miles from the coast of Newfoundland, and that it was in consequence of this that the negotiations were begun which led to the Convention of 1818; and the Convention of 1818, in the opinion of Mr. Adams, conceded to the United States all that they desired. He believed and asserted, that Great Britain had claimed, and intended to claim, exclusive jurisdiction over the Gulf of St. Lawrence, and over the Banks of Newfoundland, and he considered and stated that the treaty of 1818, in setting at rest forever those pretensions, obtained for the United States substantially what they desired. A passage is quoted in the reply of Her Majesty's government to the United States' answer from this book, in which Mr. Adams says: "The Newfoundland, Nova Scotia, Gulf of St. Lawrence, and Labrador fisheries are in nature and in consideration both of their value and of the right to share in them, *one* fishery. To be cut off from the enjoyment of that right would be to the people of Massachusetts similar in kind and comparable in degree with an interdict to the people of Georgia and Louisiana to cultivate cotton or sugar. To be cut off even from that portion of it which was within the exclusive British jurisdiction in the *strictest sense* within the Gulf of St. Lawrence and on the coast of Labrador, would have been like an interdict upon the people of Georgia or Louisiana to cultivate cotton or sugar in three-fourths of those respective States." But he goes on to speak of the warning off of American vessels sixty miles from Newfoundland, and then says: "It was this incident which led to the negotiations which terminated in the Convention of the 20th of October, 1818. In that instrument, the United States re-

nounced forever that part of the fishing liberties which they had enjoyed or claimed in certain parts of the exclusive jurisdiction of the British Provinces, and within three marine miles of the shores. This privilege, without being of much use to our fishermen, had been found very inconvenient to the British; and in return, we have acquired an enlarged liberty, both of fishing and drying fish, within other parts of the British jurisdiction forever."

Fishing for mackerel in ten fathoms of water off the bight of Prince Edward Island was not the thing then taken into consideration. There was no mackerel fishery till many years after. This controversy was caused by a claim on the one hand and a resistance on the other with reference to the ocean fisheries, to the cod-fishery, the whale-fishery, the deep-sea fishery, three leagues, fifteen leagues, sixty miles from the shore; and after the Convention of 1818 had been formed, if it had been construed as the British government construe it to-day, there would have been no more controversy on the subject. The controversy that arose after the Convention of 1818 sprang from the unwarrantable and extravagant pretensions, not so much of Her Majesty's home government, as of the Colonial authorities. In order to understand the importance that has been attributed to this subject, it is indispensably necessary that you should know what was claimed to be the interpretation of the Convention of 1818 down to a very recent day. The Provincial authorities claimed, in the first place, to exclude United States vessels from navigating the Gut of Canso. Nobody makes that claim now. In the second place, they claimed the right to exclude them from fishing anywhere in the Bay of Fundy. That claim was insisted upon until, on arbitration, it was decided against Her Majesty's government. Not only was the headland doctrine asserted as to the great bays, but under its guise, the Provincial authorities claimed the right to draw a straight line from East Point to North Cape of Prince Edward Island, and make the exclusion three miles from that point. I have had marked on the map annexed to the British case two or three of the principal lines of exclusion as they were then insisted upon, that you may know what it was that our people regarded as important. The claim to treat East Point and North Cape as headlands, and to exclude us a distance of three miles from a line drawn between them, is a notion that has not departed from the popular mind to the present day.

The affidavits from Prince Edward Island were drawn upon the theory that that is the rule, and in two or three of them, I have found it expressly stated, "that all the mackerel were caught within the three mile line; that is to say, within a line three miles from a straight line drawn from East Point to North Cape." Now, those affidavits are all in answer to one set of questions, they are all upon one model, and it is quite obvious that they were all of them colored by that view of the three mile limit, as two of them expressly say that they were. At all events, that was the claim that was made down to a very recent period. The claim also was made to exclude United States fishermen from Northumberland Strait. In the case of the *Argus*, seized by British cruisers, the ground of seizure was, that a line was to be drawn from Cape North to the northern line of Cow Bay in Cape Breton. It is marked there in red on the map. The evidence of that claim, which was the basis of the seizure of the *Argus*, is to be found in the correspondence between Mr. Everett and Lord Aberdeen on the subject. (See Mr. Everett's letter to Lord Aberdeen, quoted from in the United States brief, on page 21.) They likewise claimed to draw a line from Margaree to Cape St. George. You will find that down there. Those claims were not merely made on the quarter-deck, but they were made, some of them, in diplomatic correspondence, some of them in resolutions of the Nova Scotia Legislature. They were made, and they were insisted upon; and understanding this, I think you will be prepared to understand why it was that exclusion from such limits was regarded as important to our fishermen. You will remember that one of our oldest witnesses, Ezra Turner, testified that the captain of the cruiser "told me what his orders were from Halifax, and he showed me his marks on the chart. I well recollect three marks. One was from Margaree to Cape St. George, and then a straight line from East Point to Cape St. George, and then another straight line from East Point to North Cape. The captain said, 'If you come within three miles of these lines, fishing, or attempting to fish, I will consider you a prize.'" And a committee of the Nova Scotia Legislature, as late as 1851, in their report, say: "The American citizens, under the treaty, have no right, for the purposes of the fishery, to enter any part of the Bay of St. George, lying between the headlands formed by Cape George on the one side and Port Hood Island on the other."

Such were the claims made, and how were those claims enforced? They were enforced by the repeated seizure of our vessels, their detention until the fishing season was over, and then their release. It appears by the returns that have been made in how many instances our fishing vessels were released without a trial, after they had been detained until their voyages were ruined, and as our skippers said in their testimony, it made no difference whether the seizure was lawful or unlawful, the voyage was spoiled, and the value of the vessel almost entirely destroyed. There were repeated instances of which you have testimony of cruisers levying black-mail upon skippers, taking a portion of their fish by way of tribute from them, and letting them go on their way.

MR. THOMSON.—Instead of seizing the whole.

MR. FOSTER.—Yes, instead of seizing the whole. No doubt the poor and ignorant skippers were thankful to escape from the lion's jaws with so little loss as that. Let me give an instance. There is a letter from Mr. Forsyth, the United States Secretary of State, to Mr. Fox, the British Minister at Washington, dated the 24th of July, 1839, in which Mr. Forsyth requests the good offices of Her Majesty's Minister at Washington with the authorities at Halifax, to secure to a fisherman too poor to contend in the Admiralty Court the restoration of ten barrels of herrings taken from him by the officer who had seized his vessel and withheld the herring after the vessel itself was released.

Well, what were the laws enacted to enforce these pretensions? A Nova Scotia statute of 1836, after providing for the forfeiture of any vessel found fishing, or preparing to fish, or to have been fishing, within three miles of the coasts, bays, creeks or harbors, and providing that if the master, or person in command, should not truly answer the questions put to him in examination by the boarding officer, he should forfeit the sum of one hundred pounds, goes on to provide that if any goods shipped on the vessel were seized for any cause of forfeiture under this Act, and any dispute arises whether they have been lawfully seized, the burden of proof to show the illegality of the seizure shall be on the owner or claimant of the goods, ship, or vessel, and not on the officer or person who shall seize and stop the same. The burden of proof to show that the seizure was unlawful was on the man whose schooner had been brought to by the guns of the cutter. He was to be taken into a foreign port, and there required affirmatively

to make out that his vessel and its contents were not liable to forfeiture. If he attempted any defence, he was not permitted to do so until he had given sufficient security in the sum of sixty pounds for the costs. He must commence no suit until he had given one calendar month's notice in writing of his intention to do so, in order that the seizing officer might make amends, if he chose; and he must bring his suit within three months after the cause of action accrued; and if he failed in the suit, treble costs were to be awarded against him; while if he succeeded in the suit, and the presiding judge certified that there was probable cause for the seizure, he was to be entitled to no costs, and the officer making the seizure was not to be liable to any action. That Act, only very slightly modified, but with most of its offensive provisions still retained, was found on the Statutes of Nova Scotia as late as the year 1868, and I am not aware that it has been repealed to-day. The construction put upon it in this Province was, that a man who came into a British harbor to buy bait with which to catch fish in the deep sea, was guilty of "preparing to fish," and that it was an offence under the Act to prepare within British territorial waters to carry on a deep-sea fishery.

Such, gentlemen, was the condition of things which led the fishermen of the United States to attribute so much importance to the three-mile restriction. We know to-day that all this has passed away. We know that such pretensions are as unlikely ever to be repeated as they are sure never again to be submitted to. And why do I refer to them? Not, certainly, to revive any roots of bitterness; not, certainly, to complain of any thing so long gone by; but because it is absolutely indispensable for you to understand the posture of this question historically, in order that you may be aware how different the question we are trying to-day is from the question which has had such importance heretofore.

If the three-mile limit off the bend of Prince Edward Island and down by Margaree, where our fishermen sometimes fish a week or two in the autumn (and those are the two points to which almost all the evidence of inshore fishing in this case relates),—if the three-mile limit had been marked out by a line of buoys in those places, and our people could have fished where they had a right to, under the law of nations and the terms of the Convention of 1818, nobody would have heard any complaint. Certainly it is most unjust, after a question has had such a history

as this,—after the two nations have been brought to the very verge of war with each other in consequence of disputes based upon such claims as I have referred to,—certainly, now that those claims are abandoned, it is most unjust to say to us, “Because you complained of these things, therefore you must have thought the right to catch mackerel in ten or fifteen fathoms of water, within three miles of the bight of the island, was of great national importance.” We are not prepared to enter fairly into a discussion of the present question until it is perceived how different it is from the one to which I have been alluding. Of course, our fishermen were alarmed, and excited, and indignant, when the things were done to which I have referred. Of course it was true, that if such claims were to be maintained, they must abandon fishing in the Gulf of St. Lawrence altogether; and not only did they feel that there was an attempt, unjustly and unlawfully, to drive them out of a valuable fishery which had belonged to them and their forefathers ever since vessels came here at all, but there was also, with reference to it, a sense of wrong and outrage; and the fishermen of New England, like the rest of the people of New England, although long-suffering and slow to wrath, have ever been found to be a race “who know their rights, and, knowing, dare maintain.” But when these claims are abandoned, as they have been now, there remains simply the question, what is the value of fishing within three miles of the shore of the British territories? And this brings me to some of the immediate questions which we have to discuss.

In the first place, I suppose I may as well take up the case of Newfoundland. The case of Newfoundland, as I understand it, is almost entirely eliminated from this controversy by the decision which was made on the 6th of September. The claim, as presented in Her Majesty’s case, is not one of compensation for fishing within the territorial waters of Newfoundland, but it is one of enjoying the privileges of commercial intercourse with the people of that island. Of territorial fishing in Newfoundland waters, there is hardly any evidence to be found since the first day of July, 1873, when the fishery clauses of the Treaty of Washington took effect, with one exception, to which I will allude hereafter. There is certainly no cod fishing done by our people in the territorial waters of Newfoundland; none has been proved, and there is no probability that there ever will be during the

period of the Treaty, or afterwards. The American cod fishery is everywhere deep sea fishing. There is a little evidence of two localities in which a few halibut are said to have been taken in Newfoundland waters, — one near Hermitage Bay, and one near Fortune Bay. But the same evidence that shows that it once existed, shows that it had been exhausted and abandoned before the Treaty of Washington was made. Judge Bennet testified on that point, and said :

“The halibut fishing on the Newfoundland coast is a very limited one, so far as I am aware. It is limited to the waters between Brunet Island in Fortune Bay, and Pass Island in Hermitage Bay. It is conducted close in shore, and was a very prolific fishery for a number of years. Our local fishermen pursued it with hook and line. I think about eight years ago, the Americans visited that place for the purpose of fishing, and they fished it very thoroughly. They fished early in the season, in the month of April, when halibut was in great demand in New York market. They carried them there fresh in ice, and I know they have pursued that fishery from that time to within the last few years. I believe they have about exhausted it now.”

Another witness testified that some years ago the halibut fishery was pursued in that vicinity, but he went on to say :

“American fishermen do not now fish for halibut about Pass Island as they formerly did, because I believe that that fishery has been exhausted by the Americans. I know of no United States fishing vessels fishing within three miles of the shore, except at and about Pass Island, as already stated.” — *Affidavit of Philip Hubert, p. 54, British Affidavits.*

John Evans, p. 52 British Affidavits, says :

“The halibut fishery followed by the United States fishing vessels about Pass Island has been abandoned during late years. I have not heard of American fishing vessels trying to catch fish on the Newfoundland inshore fishery.”

There has been a little evidence that occasionally, when our vessels go into harbors to purchase bait at night, some of the men will jig a few squid, when they are waiting to obtain bait.

All the evidence shows that they go there, not to fish for bait, but to buy it. It shows also that when they are there for that purpose, the crews of the vessels are so much occupied in taking on board and stowing away the fish bought for bait, that they have no time to engage much in fishing ; but one or two witnesses have spoken of a little jiggling for squid by one or two men when unoccupied at night. As to the rest, all the fishing in the territorial waters of Newfoundland is done by the inhabitants themselves.

The frozen herring trade, which was the ground of compensation chiefly relied upon in the Newfoundland case, has been completely proved to be a commercial transaction. The concurrent testimony of the witnesses on both sides is, that American fishermen go there with money; they do not go there provided with the appliances for fishing, but with money, and with goods. They go there to purchase and to trade; and when they leave Gloucester, they take out a permit to touch and trade, that they may have the privileges of trading vessels. Perhaps it may be said that the arrangement under which this bait is taken is substantially a fishing for it. I have heard that suggestion hinted at in the course of our discussions, but plainly, it seems to me, it cannot be sound. We pay for herring by the barrel, for squid and caplin by the hundred; and the inhabitants of the island will go out to sea as far as to the French islands, there to meet American schooners, and to induce them to come to their particular localities, that they may be the ones to catch the bait for them. It is true that the British case expresses the apprehension that the frozen herring trade may be lost to the inhabitants of Newfoundland in consequence of the provisions of the Treaty. It is said that "it is not at all probable that, possessing the right to take the herring and caplin for themselves on all parts of the Newfoundland coast, the United States fishermen will continue to purchase bait as heretofore, and they will thus prevent the local fishermen, especially those of Fortune Bay, from engaging in a very lucrative employment, which formerly occupied them during a portion of the winter season, for the supply of the United States market." One of the British witnesses, Joseph Tierney, whose testimony is on page 371, in speaking of this matter of getting bait, says, in reply to the question, "How do you get that bait?" "Buy it from persons that go and catch it and sell it for so much a barrel. The American fishermen are not allowed to catch their own bait at all. Of course, they may jig their own squid around the vessel." And in reply to my question, "What would be done if they tried to catch bait?" the answer is, "They are pretty rough customers. I don't know what they would do." So it appears that American fishermen not only do not catch bait, but are not allowed to catch it. They buy the bait, and that, to my mind, is the end of the question. So far as the herring trade goes, we could not, if we were disposed to, carry it on success-

fully under the provisions of the Treaty, for this herring trade is substantially a seining from the shore, — “a strand fishing,” as it is called, — and we have no right anywhere conferred by this Treaty to go ashore and seine herring any more than we have to establish fish traps. I remember Brother Thomson and Professor Baird were at issue on the question whether we had a right to do this. Brother Thomson was clearly right, and Professor Baird was mistaken. We have not acquired any right under the Treaty to go ashore for any purpose anywhere on the British territories, except to dry nets and cure fish. I do not think that I ought to spend more time over the case of Newfoundland than this, except to call your attention to the circumstance, that in return for these few squid jigged at night, the islanders obtain an annual remission of duties averaging upwards of fifty thousand dollars a year.

We have been kindly furnished, in connection with the British affidavits, upon page 128, Appendix A, with a statement showing the duties remitted upon exports from Newfoundland to the United States, since the Treaty of Washington, and their annual average is made out to be \$50,940.45. I submit to the Commission whether we do not pay, upon any view of political economy, a thousand-fold for all the squid that our people jig after dark.

Let it not, however, for a moment be supposed that because I took up the case of Newfoundland for convenience' sake, as it is presented separately, that I regard it as a distinct part of the case. The United States has made no treaty with the Island of Newfoundland, which has not yet hoisted the flag of the “Lone Star.” When she does, perhaps we shall be happy to enter into treaty relations with her; but we know at present only Her Majesty's Government. We are dealing with the whole aggregate of concessions, from the one side to the other, and Newfoundland comes in with the rest.

Leaving, then, the island of Newfoundland, I come to the question of the value to the citizens of the United States of the concessions as to inshore fisheries in the territorial waters of the Dominion of Canada (that is, within three miles of the shore) for the five annual seasons past, and for seven years to come. In the first place, there is the right conceded to our fishermen to land in order to cure fish and dry nets, — to land on unoccupied places where they do not interfere with private property, nor with Brit-

ish fishermen exercising the same rights. In one of the oldest law reports, Popham's, an ancient sage of the law, Mr. Justice Doddrige, remarks: "Fishermen, by the law of nations, may dry their nets on the land of any man." Without asserting that as a correct rule of law, I think I may safely assert that it has been the practice permitted under the comity of nations from the beginning of human history, and that no nation or people, no kingdom or country, has ever excluded fishermen from landing on barren and unoccupied shores and rocks, to dry their nets and cure their fish. If it was proved that the fishermen of the United States did use privileges of this kind, under the provisions of the Treaty of Washington, to a greater extent than before, I hardly think that you would be able to find a current coin of the realm sufficiently small in which to estimate compensation for such a concession. But, in point of fact, the thing is not done; there is no evidence that it is done. On the contrary, the evidence is that this practice belonged to the primitive usages of a by-gone generation. Seventy, sixty, perhaps fifty years ago, when a little fishing vessel left Massachusetts Bay, it would sail to Newfoundland, and after catching a few fish, the skipper would moor his craft near the shore, land in a boat and dry the fish on the rocks; and when he had collected a fare of fish, and filled his vessel, he would either return back home, or, quite as frequently, would sail on a commercial voyage to some foreign country, where he would dispose of the fish and take in a return cargo. But nothing of that sort has happened within the memory of any living man. It is something wholly disused, of no value whatever. And it must not be said, that under this concession we acquire any right to fish from the shore, to haul nets from the shore, or to fish from rocks. Obviously, we do not. I agree entirely with the view of my brother Thomson, as manifested in his conversation with Professor Baird on that subject.

We come, then, to the inshore fishing. What is that? In the first place, there has been some attempt to show inshore halibut fishing in the neighborhood of Cape Sable. It is very slight. It is contradicted by all our witnesses. No American fisherman can be found who has ever known of any halibut fishing within three miles of the shore in that vicinity; and our fishermen all say that it is impossible that there should be halibut caught in any considerable quantities in any place where the waters are so shallow.

There is also some evidence that up in the Gulf of St. Lawrence there was once a small local halibut fishery, but the same evidence that speaks of its existence there, speaks of its discontinuance years ago. The last instance of a vessel going there to fish for halibut that has been made known to us, is the one that Mr. Sylvanus Smith testifies about, where a vessel of his strayed up into the Gulf, was captured, and was released, prior to the Treaty of Washington. As to the inshore halibut fishery, there has been no name of a vessel, except in one single instance, when a witness did give the name of the *Sarah C. Pyle*, as a vessel that had fished for halibut in the vicinity of Cape Sable. We have an affidavit from the captain of that schooner, Benjamin Swim, saying that he did not take any fish within many miles of Cape Sable. He says he has been engaged in cod fishing since April of this year, and "has landed 150,000 pounds of halibut, and caught them all, both codfish and halibut, on Western Banks. The nearest to the shore that I have caught fish of any kind this year, is, at least, 40 miles." (*Affidavit No. 242.*)

So much for the inshore halibut fishery. I will, however, before leaving it, refer to the statement of one British witness, Thomas R. Patillo, who testified that occasionally halibut may be caught inshore, as a boy may catch a codfish off the rocks; but pursued as a business, halibut are caught in the sea, in deep water. "How deep do you say?" "The fishery is most successfully prosecuted in about 90 fathoms of water, and, later in the season, in as much as 150 fathoms."

So much for the inshore halibut fishery; and that brings me to the inshore cod fishery, as to which I am reminded of a chapter in an old history of Ireland, that was entitled, "On snakes in Ireland," and the whole chapter was, "There are no snakes in Ireland." So there is no inshore cod fishery pursued as a business by United States vessels anywhere. It is like halibut fishing, exclusively a deep-sea fishing. They caught a whale the other day in the harbor of Charlottetown, but I do not suppose our friends expect you to assess in this award against the United States any particular sum for the inshore whale fishery. There is no cod fishery or halibut fishery inshore, pursued by our vessels, any more than there is inshore whale fishery. We know and our witnesses know where our vessels go. If they go near the British shores at all, they go to buy bait, and leave their money in pay-

ment for the bait. Will it be said that the cod fishery is indirectly to be paid for, because fresh bait must be used, and the cod fishery cannot profitably be pursued without fresh bait; and because we are hereafter to be deprived of the right to buy bait by laws expected to be passed, and then shall have to stop and catch it, so that by-and-by, when some new statutes have been enacted, and we have been cut off from commercial privileges, we may be forced to catch bait for cod fishing in British territorial waters? I think it will be time enough to meet that question when it arises. Any attempt to cut us off from the commercial privileges that are allowed in times of peace, by the comity of civilized nations, to all at peace with them, would of course be adjusted between the two governments in the spirit that becomes two imperial and Christian powers. I do not think that, looking forward to some unknown time when some unknown law will be passed, we need anticipate that we are to be cut off from the privilege of buying bait, and therefore you should award compensation against us for the bait which we may at that time find occasion ourselves to catch. But if it is worth while to spend a single moment upon that, how thoroughly it has been disposed of by the evidence, which shows that this practice of going from the fishing grounds on the Banks into harbors to purchase bait is one attended with great loss of time, and with other incidental disadvantages, so that the owners of the vessels much prefer to have their fishermen stay on the Banks, and use salt bait, and whatever else they can get there. St. Pierre and Miquelon are free ports; commercial intercourse is permitted there; bait can be bought there; and as the British witnesses have told us, the traffic for bait between Newfoundland and the French islands is so great, and such a full supply of bait is brought to the French islands, more than there is a demand for, that it is sometimes thrown overboard in quantities that almost fill up the harbor. That was the statement of one of the witnesses. I do not think, therefore, that I need spend more time, either upon the cod fishery, or the question of buying bait or procuring bait for cod fishing.

What shall I say of the United States herring fishery, alleged to exist at Grand Manan and its vicinity? Three British witnesses testify to an annual catch of one million, or one and a half million dollars' worth by United States fishermen in that vicinity, all

caught inshore. But these witnesses do not name a single vessel, or captain, or give the name of any place from which such vessels come, except to speak in general terms of the Gloucester fleet. These witnesses are McLean, McLeod, and McLaughlin. The fish alleged to be taken are chiefly herring. I shall not stop to read their evidence, or comment upon it in detail. They are contradicted by several witnesses, and by several depositions filed in the case, which you will find in the supplemental depositions lately printed; all of whom state what we believe to be clearly true, that the herring trade by United States vessels in the vicinity of Grand Manan is purely a commercial transaction; that our fishermen cannot afford the time to catch herring; that their crews are too large, and their vessels too expensive, to engage in catching so poor a fish as herring; that it is better for them to buy and pay for them, and that so they uniformly do. The members of the Gloucester firms who own and send out these vessels tell you that they go without nets, without the appliances to catch herring at all, but with large sums of money; they bring back the herring, and they leave the money behind them.

This question seems to me to be disposed of by the report of the Commissioner on the New Brunswick fisheries for 1876.

Mr. Venning, the Inspector of Fisheries for New Brunswick, quotes in his report on Charlotte County (pp. 266 and 267), from Overseer Cunningham of the Inner Bay. Some attempt was made to show that Overseer Cunningham, although the official appointed for the purpose, did not know much about it; but it will be observed that his statements, as well as those of Overseer Best (whose evidence is next quoted), are affirmed by Mr. Venning, the Inspector of Fisheries for New Brunswick, and inserted in his report, under his sanction; and I think that with the Minister of Marine and Fisheries, himself from New Brunswick, at the head of the Department, erroneous statements on a subject relating to the fisheries of his own Province were not likely to creep into official documents and remain there unobjected to. I think we must assume that these official statements are truer and more reliable than the accounts that come from witnesses: "The winter herring fishery," Overseer Cunningham says, "I am sorry to say, shows a decrease from the yield of last year. This, I believe, is owing to the large quantity of nets, in fact miles of them, being set by United States fishermen all the way from Grand Manan to

Lepreau, and far out in the Bay, by the Wolves, sunk from 20 to 25 fathoms, which kept the fish from coming into this Bay. In this view, I am borne out by all the fishermen with whom I have conversed on the subject. Our fishermen who own vessels have now to go a distance of six to eight miles off shore before they can catch any. The poorer class of fishermen, who have nothing but small boats, made but a poor catch. However, during the winter months, there were caught and sold in a frozen state to United States vessels, 1,900 barrels, at from \$4 to \$5 per barrel. The price being somewhat better than last year, helped to make up the deficiency in their catch."

Then he goes on to speak of the injurious effect of throwing over gurry, which, he says, is practised by Provincial fishermen as well as American, and says that, "as they are fishing far off shore a week at a time, this destructive practice can be followed with impunity and without detection." And Overseer Best speaks of the falling off in line fishing, but says that the yield of herring has exceeded that of the previous year, disagreeing with his friend, Overseer Cunningham. He attributes the deficiency in line fishing to the use of trawls. He goes on to say, "The catch was made chiefly in deep water this year, as far out as five to seven miles off the coast, and no line fish have been taken within two miles, except haddock." "The winter fishing," he says, "was principally done in deep water; as rough weather prevailed most of the time, the fishermen found it very difficult to take care of their nets, a great many of which were lost. A large number of American vessels now frequent our coasts to engage in this fishery, and pay but little attention to our laws, which prohibit Sunday fishing and throwing over gurry. This I am powerless to prevent over a stretch of 20 miles of coast, on which from 60 to 100 vessels are engaged. A suitable vessel is necessary for this work, and she should cruise around among the fishing grounds and see that the laws are respected by those who are participating in the benefits of our fisheries."

Of course, it is difficult to prove a negative; but ought not the British agent to be required, upon a subject of such magnitude as this, to produce some more satisfactory evidence? If a large fleet of American vessels are year by year catching herring within three miles of land, among an equal body of British fishermen, within a limited space near Grand Manan, and if they are

taking from a million to a million and half dollars' worth a year, is it not possible for our friends, the Minister of Marine and Fisheries and the learned counsel, both from New Brunswick, to furnish the names of just one or two vessels, or one or two captains, among the great number that are so engaged? A million to a million and a half dollars' worth is the estimate that they put upon the fishery. How many herring do you suppose it takes to come to a million or a million and a half dollars? It takes more than all the herring that are imported into the United States, by the statistics. Just in that little vicinity, they say that a greater amount of such fish are taken than are imported into the United States. Now, if an operation of that enormous magnitude is going on, it does seem to me that somebody would know something more definite about it than has appeared in this evidence. Certainly, there has been earnest zeal and the most indefatigable industry in the preparation of the British case. Nobody doubts that. There has been every facility to procure evidence; and are we not entitled to require at the hands of Her Majesty's Government something that is more definite and tangible than has appeared on this subject? I have made all the inquiry in my power, and I cannot find out what the vessels are, who their captains are, from what ports they come, or to what markets they return. We know very well what the Gloucester herring fleet is. It is a fleet that goes to buy herring; that buys it at Grand Manan; that buys it at the Magdalen Islands; that buys it in Newfoundland; but of any fleet that fishes for herring in the territorial waters of New Brunswick, after the utmost inquiry we can make, we remain totally ignorant.

There is another view of this subject which ought, it seems to me, to be decisive. Everybody admits that herring is one of the cheapest and poorest of fish, and that the former duty of a dollar a barrel, and five cents a box on smoked herring, would be absolutely prohibitory in the markets of the United States. Now, how much must these New Brunswick fishermen gain if they have as large a fishery as we have, and we have a fishery of a million and a half dollars in that vicinity? That is their statement; the British fishery is about equal to the American; the American is very near to one and a half million dollars a year in that vicinity; the British-caught fish go to the United States markets almost exclusively,—I think one witness did say two-thirds; everybody

else has spoken as if the herring market was in the United States almost altogether. How many barrels of herring does it take to come to a million dollars? We will let the other half million be supposed to consist of smoked herring in boxes. How many barrels of herring does it take? Why, it takes three or four hundred thousand. The herring sell for from two to four dollars a barrel. It takes 250,000, 300,000, or 400,000 barrels of herring; and a duty of a dollar is remitted upon each barrel,—a duty which would exclude them from our market, if it were reimposed. Is not that a sufficient compensation? If you believe that our people catch herring there to any considerable extent, is not that market from which these people derive, according to their own showing, so large sums of money, an equivalent? Remember, they say we catch a million to a million and a half dollars' worth; they say they catch as many; they say it nearly all goes to our market; the duty saved is a dollar a barrel; and, according to their own figures, they must be reaping a golden harvest. Happy fishermen of New Brunswick! By the statistics, they earn four or five times as much as the fishermen of Prince Edward Island, and the witnesses say that they earn really two or three times as much as the statistics show! They are receiving from a million to a million and a half dollars for fish sold chiefly in the markets of the United States, and the saving in duty is several hundred thousand dollars. It is true, that we cannot find imported into the United States any such quantity of herring; still, that is the account that they give of it.

This brings me, gentlemen, to the question of the inshore mackerel fishery,—that portion of the case which seems to me, upon the evidence, to be the principal part, I might almost say the only part, requiring to be discussed. Your jurisdiction is to ascertain the value of those fisheries for a period of twelve years, from July 1st, 1873, to July 1st, 1885. Of those twelve years, five have already elapsed; one fishing year has passed since the session of this Commission began. Inasmuch as the twelve years will terminate before the beginning of the fishing year in the Gulf of St. Lawrence for 1885, it is precisely correct to say, that five years have elapsed and seven remain. It is of no consequence how valuable these fisheries have been at periods antecedent to the Treaty, nor how valuable or valueless you may think they are likely to become after the Treaty shall have expired.

The twelve years' space of time limits your jurisdiction, and five-twelfths of that time is to be judged of by the testimony as to the past. The results of the five years are before you. As to the seven remaining years, the burden of proof is upon Her Majesty's Government to show what benefit the citizens of the United States may reasonably be expected to derive during that time from these fisheries. It will be for you to estimate the future by the past as well as you may be able.

This is a purely business question. Although it arises between two great governments, it is to be decided upon the same principles of evidence as if it were a claim between two men, as if it was a question how much each skipper that enters the Gulf of St. Lawrence to fish for mackerel ought to pay out of his own pocket. We are engaged in what the London *Times* has truly called "a great international lawsuit," and we are to be governed by the same rules of evidence that apply in all judicial tribunals; not, of course, by the technicalities of any particular system of law, but by those great general principles which prevail wherever, among civilized men, justice is administered. He who makes a claim is to prove his claim and the amount of it. This is not a question to be decided upon diplomatic considerations; it is a question of proof. Money is to be paid for value received, and he who claims the money is to show that the value has been received or will be. If there are extravagant expectations on the one side, that is no reason for awarding a sum of money. If there is a belief on the other side that the results of the Treaty are injurious to a great industry, which nearly all civilized nations have thought it worth while to foster by bounties, that is no argument against rendering compensation. Whatever benefit the citizens of the United States are proved to derive from the inshore mackerel fisheries, within three miles of the shore of the Gulf of St. Lawrence, for that you are to make an award, having regard to the offset, of which it will be my duty to speak at a later period. The inquiry divides itself into these two heads: first, *What has been the value from July 1, 1873, down to the present time?* and, second, *What is it going to be hereafter?* I invite your attention to the proof that is before you as to the value of the mackerel fishery since the Treaty went into effect. And here I must deal with the question: What proportion of the mackerel is caught in territorial waters, viz., within three miles from the shore? A

great mass of testimony has been adduced on both sides, and it might seem to be in irreconcilable conflict. But let us not be dismayed at this appearance. There are certain land-marks which cannot be changed, by a careful attention to which I think we may expect to arrive at a tolerably certain conclusion. In the first place, it has been proved, has it not? by a great body of evidence, that there is, and always has been, in the Gulf of St. Lawrence, a very extensive mackerel fishery clearly beyond British jurisdiction, as to which no new rights are derived by the citizens of the United States from the Treaty of Washington. It is true that the map filed in the British case, and the original statement of that case, make no distinction between the inshore and the deep-sea mackerel fisheries. To look at this map, and to read the British case, you would think that the old claims of exclusive jurisdiction throughout the Gulf were still kept up, and that all the mackerel caught in the Gulf of St. Lawrence were, as one of the witnesses expressed himself, "British subjects." But we know perfectly well, that a United States vessel, passing through the Gut of Canso to catch mackerel in the Gulf, will find numerous places where, for many years, the fishing has been the best, where the fish are the largest, and where the catches are the greatest, wholly away from the shore. The map attached to the British case tells this story, for all through the Gulf of St. Lawrence, the gentlemen who formed that map have put down the places where mackerel are caught; and if the map itself does not indicate that seven-eighths of the mackerel fishing grounds must be clearly far away from the shore, I am very much mistaken. At the Magdalen Islands, where we have always had the right to fish as near as we pleased to the shore, the largest and the best mackerel are taken. At Bird Rocks, near the Magdalen Islands, where there is deep water close to the rocks, and where the mackerel are undoubtedly taken close in shore (within two or three miles of the Bird Rocks, you will find the water to be twenty fathoms deep), — all around the Magdalen Islands, the mackerel fishing is stated by the experts who prepared this map to be good the season through. Then we have the Bank Bradley, the Bank Miscou, the Orphan Bank, the Fisherman's Bank, and we have the fishing ground of Pigeon Hill; all these grounds are far away from the shore, where there cannot be the least doubt that our fishermen have always had the right to fish, aside from

any provisions of the present Treaty. The most experienced and successful fishermen who have testified before you say that those have been places to which they have resorted, and that there they were most successful.

Look at the testimony of Andrew Leighton, whom we heard of from the other side early as one of the most successful fishermen that ever was in the Gulf. He speaks of the largest season's fishing any man ever had in the Bay — 1,515 barrels, — and says, "I got the mackerel the first trip at Orphans and the Magdalens; the second trip at the Magdalens; the third trip at Fisherman's Bank, and I ran down to Margaree and got 215 barrels there, and went home." All the mackerel at Margaree, he says, were caught within two miles of the shore, — within the admitted limits. Recall the evidence of Sylvanus Smith and Joseph Rowe, experienced and successful fishermen, who tell you that they cared little for the privilege of fishing within three miles of the land; that they did not believe that vessel fishing could be prosecuted successfully there, because it required deeper water than is usually found within the distance of three miles to raise a body of mackerel sufficient for the fishermen on a vessel to take the fish profitably; that boat fishing is a wholly distinct thing from vessel fishing; that boats may anchor within three miles of the land, and pick up a load in the course of a day, at one spot, where mackerel would be too few and too small for a vessel with fifteen men to fish to any advantage. Almost all the evidence in this case of fishing within three miles of the shore relates to the bend of Prince Edward Island and to the vicinity of Margaree. As to the bend of the Island, it appears in the first place that many of our fishermen regard it as a dangerous place, and shun it on that account, not daring to come as near the shore as within three miles, because, in case of a gale blowing on shore, their vessels would be likely to be wrecked. It appears, also, that even a large part of the boat fishing there is carried on more than three miles from the shore. Undoubtedly, many of the fishermen have testified to the contrary; many of the boat fishermen from the Island have testified that nearly all their fish were caught within three miles; still it does appear, by evidence that nobody can controvert, that a great part of the boat fishing is more than three miles out. One of the witnesses from the Island, James McDonald, says in his deposition, that from the middle of September

to the first of November, not one barrel in five thousand is caught outside the limits; and he gives as a reason, that the water will not permit fishing any distance from the shore, because it is too rough. But it is perfectly obvious, that a man who so testifies either is speaking of fishing in the very smallest kind of boats, little dories, that are not fit to go off three miles from the shore, and therefore knows nothing of vessel or large boat fishing, or else that he is under the same delusion that appears in the testimony of two other witnesses to which I referred in another connection: McNeill, who on page 42 of the British affidavits describes the three-mile limit thus, "a line drawn between two points taken three miles off the North Cape and east point of this Island;" and John A. McLeod, on page 228, who defines the three-mile limit as "a line drawn from points three miles off the headlands." When a witness comes here and testifies that after September, not one barrel of mackerel in five thousand is taken outside of the three-mile limit, because it is too rough to go so far out, he is either speaking of a little cockle-shell of a boat, that is never fit to go out more than one or two miles, or else he retains the old notion, that the headland line is to be measured from the two points, and that three miles outside that line (which would be something like twenty-five or thirty miles out from the deepest part of the bend of the Island) is the territorial limit.

MR. THOMSON.—If you will read the other portion of his deposition, you will see that your statement is not quite fair.

MR. FOSTER.—"That the fish are nearly all caught close to the shore, the best fishing-ground being about one and one-half miles from the shore. In October, the boats sometimes go off more than three miles from land. Fully two-thirds of the mackerel are caught within three miles from the shore, and all are caught within what is known as the three-mile limit, that is, within a line drawn between two points taken three miles off the North Cape and East Point of this Island." (McNeill, p. 42.) We will have this evidence accurately, because I think it sheds considerable light on the subject. "That nine-tenths of our mackerel are caught within one and one-half miles from the shore, and I may say the whole of them are caught within three miles of the shore." (McLeod, p. 228.) Somewhere the expression "not one barrel in five thousand" occurs. It is in one of those affidavits; perhaps in the first one. I have read the passage, so as to do no injustice to the statement of the witness.

Mr. Hall testified that, for a month before the day of his testimony, that is to say, after about the first week in September, no mackerel were caught within five or six miles of the shore; and he applied that statement to the specimen mackerel which were brought here for our inspection and our taste; and Mr. Myrick, from Rustico, told the same story. Moreover, all their witnesses, in speaking of the prosperity of the fishing business of the Island, which has been dwelt upon and dilated upon so much, speak of the fact that not only are the boats becoming more numerous, but they build them larger every year,—longer, deeper, and bigger boats,—why? To go farther from the shore. So said Mr. Churchill. I call that a pretty decisive test of the question, what proportion of the mackerel is caught within three miles of the shore. What does Professor Hind say on that subject? In the report that has been furnished us, he says (page 90):—“Mackerel catching is a special industry, and requires sea-going vessels. The boat equipment so common throughout British American waters is wholly unsuited to the pursuit of the mackerel which has been so largely carried on by United States fishermen. Immense schools of mackerel are frequently left unmolested in the Gulf and on the coasts of Newfoundland, in consequence of the fishermen being unprovided with suitable vessels and fishing gear. It is, however, a reserve for the future, which, at no distant day, will be utilized.” Then he goes on to remark, that the use of the telegraph is likely to become of great value in connection with these fisheries.

Now, is there any explanation of these statements, except that the bulk of the mackerel are caught more than three miles off, in the body of the Gulf? If it is a “special industry,” to which boats are wholly unsuited, can it possibly be true that a great proportion of the fish is caught within three miles of the shore? How can you account for these statements of their scientific witness in his elaborate report, except by the fact that he knows that the mackerel fishery is, so large a part of it, a fishery more than three miles off the coast, that it can profitably be pursued only in vessels?

There are two other things that lie beyond the range of controversy, to which I wish to call your attention. In the first place, there is a statement made by the United States Consul at Prince Edward Island, J. H. Sherman, back in 1864, in a communication

to the Secretary of State at Washington, long before any question of compensation had arisen,—a confidential communication to his own Government, by a man who had every opportunity to observe, and no motive to mislead. He was writing with reference to the value of the inshore fisheries, and the statement so perfectly corresponds with what I believe to be the real truth, that I desire to read it: “The Reciprocity Treaty seems to have been an unalloyed boon to the colony. The principal benefit that was expected to accrue to the United States by its operation was from the removal of the restriction upon our vessels engaged in the fisheries to a distance of three marine miles from the shore; but whatever advantage might have been anticipated from that cause has failed to be realized.

“The number of vessels engaged in the fisheries on the shores of this colony has greatly diminished since the adoption of that treaty, so that it is now less than one-half the former number. The restriction to three marine miles from the shore (which we imposed upon ourselves under a former treaty) has, I am assured, but few, if any disadvantages, as the best fish are caught outside of that distance, and the vessels are filled in less time, from the fact that the men are liable to no loss of time from idling on the shore.”

Next take Appendix E of the British case. Look at the report of the Executive Council of Prince Edward Island, made to the Ottawa Government in 1874, with reference to the preparation of this very case. They are undertaking to show how large a claim can be made in behalf of the inshore fisheries of the Island, and what do they say? Page 3, paragraph 8: “From the first of July to the first of October is the mackerel season around our coasts, during which time the United States fishing fleet pursues its work, and it has been shown” (I do not know where it has been shown) “that in 1872, over one thousand sail of United States schooners, from 40 to 100 tons, were engaged in the mackerel fishery alone,”—more than the whole number of the United States vessels licensed to pursue the mackerel and cod fisheries in that year. So that those statistics were large, and the gentlemen who prepared this statement were not indisposed to do full justice to their claims. They did not mean to understate the use made of the fisheries of the Island, nor the importance of them to the United States fishermen. “This fact, together with our experi-

ence in the collection of ‘Light money,’ now abolished, as well as from actual observation, a fair average of United States vessels fishing around our coast during the season referred to may be safely stated at three hundred sail, and as a season’s work is usually about six hundred barrels per vessel, *we may fairly put down one-third of the catch as taken inside of the three-mile limit.*”

Such was the extent of the claim of the Prince Edward Island Government with reference to the proportion of the inshore and offshore catch of mackerel, when they began to prepare this case. After this, they may pile affidavits as high as they please, they can never do away with the effect of that statement. Those gentlemen know the truth. The rest of this paragraph goes on to estimate that five dollars a barrel is the net cost of the fish, but I will not go into that.

MR. THOMSON.— You will not adopt that whole paragraph ?

MR. FOSTER.— Hardly. I adopt the statement, that in the judgment of the Executive Council of the Island, the strongest claim that they could make as to the proportion of mackerel taken within three miles of the shore was one-third.

But we have more evidence about this inshore fishery ; for I am now trying to call your attention to those matters that lie outside the range of controversy, where you cannot say that the witnesses, under the pressure of excited feeling, are making extravagant statements. Let us see what the statement was in the debates upon the adoption of the Treaty. Dr. Tupper, of Halifax, in giving an account of the state of the fisheries, says : “ The member for West Durham stated that if Canada had continued the policy of exclusion, the American fisheries would very soon have utterly failed, and they would have been at our mercy. This was a great mistake. Last summer, he went down in a steamer from Dalhousie to Pictou, and fell in with a fleet of thirty American fishing vessels, which had averaged three hundred barrels of mackerel in three weeks, and had never been within ten miles of the shore.” I am inclined to concede, for the purposes of the argument, that of the mackerel caught by boats off the bend of Prince Edward Island, about one-third are taken within three miles of the shore. I believe it to be a very liberal estimate, and I have no idea that any such proportion was ever taken by a single United States vessel fishing in that vicinity. I have already alluded to the fact, that the boat fishing and the vessel fishing are wholly

different things, and to the necessity of a vessel being able to raise a great body of mackerel. Do you remember the testimony of Captain Hurlbert, pilot of the *Speedwell*, certainly one of the most intelligent and candid witnesses that has appeared here? He stated that you could not catch the mackerel in any quantities on board vessels off the bend of the Island, within three miles, because the water was not deep enough. Take the chart used by Prof. Hind in connection with his testimony, and see within three miles of the shore how deep the water is. Ten to fifteen fathoms is the depth as far out as three miles. You will hardly find twenty fathoms of water anywhere within the three mile zone. Captain Hurlbert gave, with great truth, the reason for his opinion, that there was not depth of water enough there to raise a body of mackerel necessary for profitable vessel fishing. My brother Davies felt the force of that, and cross-examined him about the Magdalen Islands. I have been looking at the chart of the Magdalen Islands, and I have also considered the testimony as to the fishing in that vicinity. A great deal of the fishing at the Magdalen Islands is done more than three miles from the shore. The place where the best mackerel are taken, Bird Rocks, will be found to have twenty fathoms of water within the three mile limit. And when you come to that locality where I honestly believe a larger proportion of mackerel are caught within three miles than anywhere else, that is, off Margaree, in the autumn, you will find, by the chart, that the water there is deep, and that twenty fathoms is marked for quite a distance in a great many localities, within three miles of the land. I have always understood the Byron Islands and the Bird Rocks to be a part of the Magdalen Islands, and they have always been so testified to by the witnesses. When they have spoken of the Magdalen Islands, they have included fishing in those two localities as within the Magdalen Islands fisheries. In speaking of localities, they name the Bird Rock, but they speak of it as part of the Magdalen Islands. That particular question of geography may deserve more attention hereafter. I cannot now pause to consider it.

Right here, let me read from an early report on this subject of fishing inshore. Capt. Fair, of Her Majesty's Ship *Champion*, in 1839, says that he passed through a fleet of six or seven hundred American vessels in various positions, some within the headlands of the bays, and some along the shores, but none within the three

mile interdiction. While cruising in the vicinity of Prince Edward Island, he states that there was not "a single case which called for our interference, or where it was necessary to recommend caution; on the contrary, the Americans say that a privilege has been granted them, and that they will not abuse it." (*Sabine's Report on the Fisheries*, page 410.)

There is something peculiar about this Prince Edward Island fishery, and its relative proportion to the Nova Scotia fishery. As I said before, I am inclined to believe that the greatest proportion of mackerel caught anywhere inshore is caught off Margaree, late in the autumn. The United States vessels, on their homeward voyage, make harbor at Port Hood, and lie there one or two weeks; while there, they do fish within three miles of Margaree Island; not between Margaree Island and the main land, but within three miles of the island shores; and just there is found water deep enough for vessel-fishing. Look at the chart, which fully explains to my mind the inshore fishing at this point. Margaree is a part of Nova Scotia, and Prof. Hind says there is an immense boat-catch all along the outer coast of Nova Scotia, and estimates that of the Dominion mackerel catch, Quebec furnishes 7 per cent. (he does not say where it comes from), Nova Scotia 80 per cent., New Brunswick 3 per cent., and Prince Edward Island 10 per cent. Considering the fact that the preponderance of the testimony in regard to the mackerel fishery comes from Prince Edward Island, is it not strange that it does not furnish more than 10 per cent. of the entire catch; that is, not more than 12,000 or 16,000 barrels of mackerel a year? But this accords with the report of J. C. Tache, Deputy Minister of Agriculture, pages 43 and 44, which is the most intelligible report or statistical memoranda of the Canadian fisheries that I have found. It bears date 1876, and, in narrow compass, is more intelligible to me, at least, than the separate statements which I am obliged to draw from the large volumes. Mr. Tache says that "the figures of the Fisheries' Report are a very great deal short of the real quantities caught every year, as regards cod and herring, although coming quite close to the catch of mackerel. The reason is, that it is specially from large commercial houses, which are principally exporters of fish, that the information is gathered by the fisheries' officers; then it comes that mackerel being principally obtained for exportation, and held in bond by large dealers, is found almost adequately represented in these returns."

When I called Prof. Hind's attention to these statements, and remarked to him that we had not heard much said about the places where mackerel were caught in Nova Scotia, he replied it was because there was an immense boat-catch on the coast. If there has been any evidence of United States vessels fishing for mackerel within three miles of the shore, or more than three miles from the shore of the outer coast of Nova Scotia, it has escaped my attention. There is no considerable evidence, I do not know but I might say, no appreciable evidence, of United States vessels fishing for mackerel off the coast of Nova Scotia. (I am not now speaking of Margaree, but the coast of Nova Scotia.) As to Cape Breton, very little evidence has been given except in reference to the waters in the neighborhood of Port Hood.

You will observe that this estimate of the Prince Edward Island fisheries, ten per cent., must be nearly correct. It is larger than the returns of exportation, a little larger than Mr. Hall's estimate, and I think if I say that from 12,000 to 15,000 barrels of mackerel are annually exported from Prince Edward Island, I shall do full justice to the average quantity of fish caught there. Now, it does seem to me, that there has been no evidence that can tend to lead you to suppose that the quantity taken by United States vessels in that neighborhood since the Treaty of Washington, five years ago, compares at all in magnitude with the quantity taken by the Island vessels themselves.

There are some other topics connected with the mackerel catch to which I want to call your attention. Remember, gentlemen, always, that we hold this investigation down to the period of the Treaty; and that you have no right to make any award against the United States for any thing anterior to the first day of July, 1873, or subsequent to twelve years later than that.

Now, I wish to present some figures relative to the years that have elapsed since the fishery clauses of the Treaty of Washington took effect. I will begin with 1873. That year, the Massachusetts inspection of mackerel was 185,748 bbls.; the Maine inspection was 22,193 bbls.; the New Hampshire inspection was 2,398 bbls. (I am quoting now from Appendix O.) The total amount of the Massachusetts, Maine, and New Hampshire inspection, for the year 1873, is 210,339 bbls. That is the entire amount caught by United States vessels and boats around our shores, coasts, and in the Gulf of St. Lawrence. Whatever comes from our vessels

appears in the inspection. During that year, we are favored with the returns from Port Mulgrave ; and, allowing for a little natural spirit of exaggeration, which some might attribute to the patriotic feelings of the Collector, and others to the disposition of American fishermen to tell as good stories of their catch as they can, we find the Port Mulgrave returns to be pretty accurate. They are a few per cent. in excess of the statistics of the catches, with which I have compared them, to some extent ; but still they are tolerably accurate and fair returns for that year. They give 254 vessels, with an average catch of 348 sea barrels, and 313 packed barrels, aggregating 88,012 sea barrels. Taking off ten per cent. for loss by packing, which accords with the current of the testimony,— the Port Mulgrave inspector estimates the loss by packing to be $7\frac{1}{2}$ per cent., and he estimates 15 bbls. off, but the current of the testimony makes it ten per cent.,— the aggregate was 79,211 packed barrels. Of the 254 vessels, 131 came from Gloucester. Of these 254 vessels, 25 were lost that year ; a loss of ten per cent. of all the United States vessels that were in the Gulf. One-tenth part of all the vessels that came to the Gulf that year were lost. That is the largest catch that our vessels have made since the Treaty. Of that 79,211 bbls., which were caught by United States vessels in the Gulf of St. Lawrence, in the year 1873, what proportion are you prepared to assume was caught inshore ? Is not a third a liberal estimate ? Taking the Magdalen Islands, taking Bank Bradley, taking Orphan Bank, taking Miscou Bank, taking the Pigeon Hill grounds, taking the fishing off the bend of the island, that place where Capt. Rowe said he always found the best and largest fish, inside of New London Head, 12 or 15 miles out,— taking all these well-known localities into consideration, I ask whether there can be any doubt that it is a very liberal estimate indeed to say one-third was caught inshore ? I do not think that all the mackerel taken by United States vessels inshore, in all parts of the Gulf of St. Lawrence, averages an eighth or a tenth of the total catch, but I will assume for the moment one-third, the proportion which the Executive Council of Prince Edward Island thought a fair average for the shores of their island. That would make 26,404 bbls. caught in British territorial waters in that year, the first year of the Treaty. What were these mackerel worth ? Mr. Hall tells you that he buys them, landed on shore, for \$3.75 a barrel. After they have been caught,

after the time of the fishermen has been put into the business, he buys them for \$3.75 a barrel. If they are worth \$3.75 a barrel when they are caught, what proportion of that sum is it fair to call the right to fish for them worth? You may set your own figures on that. Call it one-half, one-third, or one-quarter. I should think it was somewhat extraordinary if the right to fish in a narrow zone three miles wide was worth any large portion of the value of the fish after they were caught and landed. But you may estimate that as you please. I will tell you how you will come out if you charge us with having caught a third of our fish inshore that year, and with the full value that Mr. Hall pays for them after they are caught. It is \$99,015.

That was the first year of the Treaty, and there were imported into the United States from the British Provinces 90,889 bbls., on which the duty of \$2.00 a barrel would amount to \$181,778. The value of the fish that our people caught is \$99,000, and the British fishermen gain in remission of duties nearly \$182,000.

Look at it in another way. Does anybody doubt that, barrel for barrel, the right to import mackerel free of duty is worth more than the right to fish for them? Is not the right to carry into the United States market, after they are caught, a barrel of mackerel, worth as much as the right to fish for a barrel of mackerel off the bight of the Island? Estimating it so, 90,889 bbls. came in duty free, and there were caught in the Gulf, by American vessels, 79,211 bbls. That is the first year of the Treaty, and by far the best year.

The next year, 1874, the Massachusetts inspection was 258,380 bbls. Since 1873, there has been no return from Maine. There is no general inspector, and the Secretary of State informs us that the local inspectors do not make any returns. I suppose that if you call the Maine catch 22,000 bbls., the same as the year before, you will do full justice to it; for the Maine mackerel fishery, according to the testimony, has obviously declined, for years. The inspection in New Hampshire was 5,519 bbls. There was imported into the United States that year from the Provinces, 89,693 bbls., on which there was saved a duty of \$179,386. That year, the Port Mulgrave returns show 164 vessels to have been in the Gulf of St. Lawrence, of which 98 came from Gloucester. 63,078 $\frac{1}{2}$ sea barrels, or 56,770 packed barrels were taken. The Gloucester vessels caught 48,813 bbls. Take these 56,770 packed barrels as

the aggregate catch in the year 1874 in the Gulf of St. Lawrence, by United States vessels, and set them off against the 89,693 barrels imported into the United States, and where do you come out? Pursuing the same estimate, that one-third may have been caught inshore,—an estimate which I insist is largely in excess of the fact,—there would be 18,923 bbls. caught inshore, which would be worth \$70,961, at Mr. Hall's prices; and you have \$70,961 as the value, after they are caught and landed, of the mackerel we took out of British territorial waters, to set against a saving of \$179,386 on American duties. That is the second year.

Now, come to 1875. That year the catch was small. The Massachusetts inspection was only 130,064 bbls.; the New Hampshire inspection, 3,415 bbls. The Provincial importation into the United States is 77,538 bbls. That fell off somewhat, but far less than the Massachusetts inspection, in proportion. The duty saved is \$155,076. Fifty-eight Gloucester vessels are found in the Bay, as we ascertain from the Centennial book, and Mr. Hind, speaking of the mackerel fishery in 1875, and quoting his statistics from some reliable source, says, "The number of Gloucester vessels finding employment in the mackerel fishery in 1875 was 180. Of these, 93 made Southern trips, 117 fished off shore, and 58 visited the Bay of St. Lawrence; 618 fares were received, 133 from the South, 425 from off shore, and 60 from the Bay." (Hind's Report, pp. 88, 89.) Fifty-eight vessels from Gloucester made 60 trips.

Now, where are the Port Mulgrave returns for 1875? They were made, for we have extracted that fact. We have called for them. I am sure we have called often and loud enough for the Port Mulgrave returns of 1875 and 1876. Where are they? They are not produced, although the Collector's affidavit is here, as well as the returns for 1877, which we obtained, and of which I shall speak hereafter. The inference from the keeping back of these returns is irresistible. Our friends on the other side knew that the concealment of these returns was conclusive evidence that they were much worse than those of the previous year, 1874; and yet they preferred to submit to that inevitable inference rather than have the real fact appear. Rather than to have it really appear how much the 58 Gloucester vessels caught in the Bay that year, they prefer to submit to the inference which must necessarily be drawn, which is this,—and it is corroborated by the testimony of many of their witnesses,—that that year the fishing

in the Bay was a total failure. I can throw a little more light on the result of the fishing in the Bay that year. There were 58 vessels from Gloucester, which averaged a catch of 191 bbls., while 117 on the United States coast caught an average of 409 bbls. This comes from the statistics for the Centennial. Eleven thousand and seventy-eight barrels of mackerel taken from the Gulf of St. Lawrence in 1875 is all that we know about. What more there were, our friends will not tell us, because the aggregate of 11,078 bbls. caught by 58 vessels, averaging 191 bbls. a vessel, is so much better result than the Port Mulgrave returns would show, that they prefer to keep the returns back. I think, gentlemen, that this argument from the official evidence in your possession is one that, under the circumstances, you must expect to have drawn. That year, so far as we know, only 11,078 bbls. of mackerel came out of the Gulf; but double it. You will observe that more than half of the vessels have come from Gloucester every year. The previous year, there were 98 out of 164. Let us double the number of vessels that came from Gloucester. Suppose that there were as many vessels came from other places, and that they did as well. The result would give you 23,156 bbls. Take the actual result of the Gloucester vessels; suppose as many more came from other places, when we know that the previous year a majority came from Gloucester (I want to be careful in this, for I think it is important), and about 23,000 bbls. of mackerel were taken out of the Gulf of St. Lawrence in the year 1875, against an importation of 77,538 bbls. into the United States from the Provinces, on which a duty was saved of \$155,076.

In the year 1876, by the official statement, which was lost, 27 trips were returned to the Custom House as being made by Gloucester vessels to the Gulf of St. Lawrence. I cannot verify that; it depends merely upon memory. We have not had the Port Mulgrave returns. I give my friends leave to put them in now, if they will do so, or give us an opportunity to examine them. I invite them to put them in now, if they think I am over-stating the result. There were 27 Gloucester vessels (I may be in error about this, it is mere memory) came to the Gulf in 1876. The Massachusetts inspection was 225,941 bbls.; the New Hampshire inspection was 5,351 bbls. The United States importation was 76,538 bbls. Duty saved, \$153,076. To be sure, they will say that 1875 and 1876 were poor years. They were poor years; no

doubt about that. But average them with 1873 and 1874, and see if the result is in the least favorable; see if they are able to show any considerable benefit derived by our people from inshore fishing, or any thing which compares with the saving in respect to duty that they make.

When we began this investigation, nearly every witness that was examined was asked whether the prospects for the present year were not very good,—whether it was not likely to be an admirable mackerel year in the Gulf, and they said “Yes.” They said the Gulf was full of mackerel. Somehow or other, that impression got abroad, and our vessels came down here in greater numbers than before for several years. One witness has seen 50 or 75 vessels there. I think 76 came from Gloucester. There may have been 100 there in all. You will recollect that one witness said the traders in Canso telegraphed how fine the prospects were,—with a view, probably, to increase their custom; but they did expect that the fishing in the Gulf of St. Lawrence was to be better than it had been for a long time. Let us see what has happened this year. We have a part of the Port Mulgrave returns, down to the 25th of Sept., 1877. There is another page, or half-page, which our friends have not furnished us. I invite them to put that in now. I would like it very much. But so much as we were able to extract produced the following result:—60 vessels; 8,365½ bbls.; an average of 139½ sea-barrels, or 125 packed bbls.; and one of our affidavits says that the fish on one vessel were all bought. The *John Wesley* got 190 bbls., very much over the average, and the witness said he went to the Gulf, could not catch any mackerel, and thought he would buy some of the boatmen. But 125 packed barrels is the average catch, and 8,365½ is the total number of bbls. Now, multiply that by the value of the mackerel after they are landed, and see what is the result. It is about \$31,370.

I will not stop to do that sum accurately, because it is too small; but I will call your attention to the results of the importations this year. The importations into Boston, to October 1st, from Nova Scotia and New Brunswick, were 36,576 barrels; from Prince Edward Island, 14,549½ barrels; in all, 51,125½ barrels, which would amount in duty saved to \$102,251, up to the 1st of October. It is not strictly evidence,—and if my friends object to it, it may be stricken out,—but here is the last report of the

Boston Fish Bureau, that came yesterday, which gives later results. Up to November 2d, there had been 77,617 barrels imported into Boston from the Provinces — more than double the amount that was imported in 1876, up to the same time; so that, while there has been this great falling off in the vessel fishery in the Gulf, — it is a total failure to-day, — there has been double the catch by boats, and double the catch by the Provincial fishermen. They have saved \$155,234 of duty, as against something like \$30,000 worth of fish, when they are caught. It may be said that these returns will not represent the average, but we had a witness here, the skipper of the schooner *Eliza Poor*, Captain William A. Dickie, who testified, on page 264 of the American evidence, that he had 118 sea-barrels, or 106 packed barrels. He was one of those men who happened into Halifax, on his schooner, and upon cross-examination, it was drawn from him by Brother Doutre, that Mr. Murray, the Collector at Mulgrave, told him that he had an average or more than an average of the catch of the United States fleet. He saw fifty United States vessels in the Gulf. In the absence of more complete returns, that is the best account I am able to give of the condition of the mackerel fishery in the Gulf of St. Lawrence since the Treaty of Washington was enacted.

I might confirm this by calling your attention to the testimony of witnesses from the other fishing towns in Massachusetts, — Provincetown, Wellfleet, and other places, — showing how the number of their vessels has decreased, and that the business is being abandoned, so far as the Gulf of St. Lawrence goes. Whatever is left of it is concentrated in Gloucester, and there its amount is insignificant.

I have spoken incidentally of the amount of duties saved upon the Provincial catch. On the subject of duties, I propose to speak separately by-and-by; but I do not wish to leave this branch of the subject without calling your attention to what strikes me as evidence so convincing that it admits of no answer. We have shown you how, under the operation of the Treaty of Washington, or from natural causes, the mackerel fishery of the United States vessels in the Gulf of St. Lawrence has been dwindling down; that hardly any profitable voyages have been made to the Gulf since the Treaty. Certainly, there has been no year when the fishing of our vessels in the Gulf has not been a loss to the fishermen. Let me call your attention to the fisheries of the

Provinces. In 1869, Mr. Venning, in making his fishery report, after speaking of the falling off in the mackerel catch, went on to say: "This may be accounted for chiefly by stating, that a large proportion of our best mackerel catchers ship on board American vessels on shares, and take their fish to market in those vessels, and thus evade the duty; but after selling their fish, for the most part return home with the money."

The Hon. S. Campbell, of Nova Scotia, in the debate on the Reciprocity Treaty, says:—

"Under the operation of the system that had prevailed since the repeal of the treaty of 1854, the fishermen of Nova Scotia had, to a large extent, become the fishermen of the United States. They had been forced to abandon their vessels and homes in Nova Scotia, and ship to American ports, there to become engaged in aiding the commercial enterprises of that country. It was a melancholy feature to see thousands of young and hardy fishermen compelled to leave their native land to embark in the pursuits of a foreign country, and drain their own land of that aid and strength which their presence would have secured."

Mr. James R. McLean, one of our witnesses, was asked whether the condition of things was not largely due to want of capital, and he said:—

"It was owing to this reason: We had to pay \$2 a barrel duty on the mackerel we sent to the United States, and the men would not stay in the Island vessels when they saw that the Americans were allowed to come and fish side by side with the British vessels, and catch an equal share of fish; of course this was the result. The fishermen consequently went on the American vessels; our best men did so, and some of the very best fishermen and smartest captains amongst the Americans are from Prince Edward Island and Nova Scotia."

Captain Chivirie, the first and favorite witness called on the British side, says:—

"Q. What class of men are the sailors and fishermen employed among the Americans? A. I would say that for the last fifteen years two-thirds of them have been foreigners.

"Q. What do you mean by the term 'foreigners?' A. That they are Nova Scotians, and that they come pretty much from all parts of the world. Their fishermen are picked pretty much out of all nations.

"Q. If the Americans were excluded from our fishing privileges, what do you think these men would do? A. They would return to their native homes and carry on fishing there.

"Q. Have many of them come back? A. Oh, yes. We have a number of Island men who have returned. A large number have done so. A great many come home for the winter and go back to the States in the spring; but during the past two years many of this class have come down to remain. This year I do not know of more than a dozen out of three hundred in my neighborhood who have gone back. They get boats and fish along the coast, because they find there is

more money to be secured by this plan of operations. The fisheries being better, the general impression is that they are all making towards home to fish on their own coast."

James F. White says in his affidavit, put in on the British side :—

"The number of boats fishing here has trebled in the last three years. The reason of this increase is that other business is depressed, and fishermen from the United States, Newfoundland, New Brunswick and Nova Scotia are coming here to settle, attracted by the good fishing, so that we are now able to get crews to man our boats, which formerly we were unable to do. Another reason is, that the year 1875 was a very good year, and owing to the successful prosecution of the fishing that year, people's attention was turned to the business, and they were incited to go into it."

And another of their men, Meddie Gallant, says in his affidavit :—

"In the last five years, the number of boats engaged in fishing in the above distances has at least doubled. At this Run alone there has been a very great increase. Eight years ago there were only eight boats belonging to this Run, now there are forty-five. The boats are twice as good in material, fishing outfit, in sailing, in equipment, in rigging, and in every way, as they were five years ago. There is a great deal more money invested in fishing now than there was. Nearly every one is now going into the business about here. The boats, large and small together, take crews of about three men each. That is, besides the men employed at the stages about the fish, who are a considerable number."

So, then, while the mackerel fishing of our vessels in the Gulf has been diminishing, theirs has been largely increasing. What! all this, and money too! Is it not enough that two, three, or four times as much fish is taken by them as before the Treaty? Is it not enough that they are prosperous, that those who have left them are returning home, and everybody is going into the business? Can they claim that they are losers by the Treaty of Washington? Is it not plain that they have, in consequence of its provisions, entered upon a career of unprecedented prosperity?

At this point, Mr. Foster suspended his argument, and the Commission adjourned until Tuesday, at noon.

TUESDAY, Nov. 6, 1877.

The Commission met according to adjournment, and Mr. Foster resumed his argument.

Gentlemen of the Commission:—At the adjournment yesterday, I had been giving some description of the quantity of the mackerel fishing since the Treaty of Washington, by American vessels in the Gulf of St. Lawrence and in the vicinity of British waters. For the years 1873 and 1874, I am content to rest upon the information derived from the Port Mulgrave statistics. With reference to the subsequent years, 1875, 1876, and 1877, there are one or two pieces of evidence to which I ought, perhaps, specifically to refer. Your attention has already been called to the fact, that the Magdalen Islands and the Banks in the body of the Gulf of St. Lawrence,—of which Prof. Hind says there are many not put down on the chart, “and wherever you find banks,” he says, “there you expect to find mackerel,”—have been the principal fishing grounds of the United States vessels for many years. The disastrous results of the great gale of 1873, in which a large number of United States vessels were lost, and in which more than twenty Gloucester vessels went ashore on the Magdalen Islands, show where, at that time, the principal part of the mackerel fleet was fishing. In 1876, the report of the Commissioner of Fisheries for the Dominion speaks of the number of vessels that year found at the Magdalen Islands. He says, “About one hundred foreign vessels were engaged fishing this season around the Magdalen Islands, but out of that number, I do not calculate that there were more than fifty engaged in mackerel fishing, and according to the best information received, their catch was very moderate.”

We have also the statement of one of the Prince Edward Island witnesses, George Mackenzie, on page 132 of the British evidence, who, after describing the gradual decrease of the American fishery by vessels, says, “There has not been for seven years a good vessel mackerel fishery, and for the last two years, it has been growing worse and worse.” He estimates the number of the United States vessels seen off the Island at about fifty. We have also the testimony of Dr. Fortin on the subject, who spent a number of weeks this year, during the height of the fishing season, in an expedition after affidavits, that took him all around the Gulf, where he could not have failed to see whatever American vessels were fishing there. He says, he “may have seen about twenty-five

mackereling and sailing about," and that he heard at the Magdalен Islands there were seventy. According to the best information that I can obtain, that is not far from correct. Joseph Tierney, of Souris, says that there were twenty or thirty at Georgetown, fifteen or twenty at Souris, and he should think when he left home there were seventy-five. Ronald Macdonald, of East Point, says that he has not seen more than thirty sail this year at one time together; that last year he saw as many as a dozen and perhaps fifteen or twenty sail at a time. The number has diminished very much, he says, for the last five or six years, until this year.

Now, gentlemen, this is the record of the five years during which United States fishermen, under the provisions of the Treaty of Washington, have derived whatever advantages they could obtain from the inshore fisheries. I have heard the suggestion made, that it would have been better if this Commission had met in 1872, because there might have then been evidence introduced with reference to the whole twelve years of the Treaty of Washington, and I have even heard it said that it would have been fair to estimate the value of the privilege for the twelve years according to the appearance at that time. That is to say, that it would have been fairer to estimate by conjecture than by proof, by anticipation than by actual results. It seems to me, on the contrary, gentlemen, that the fairer way would have been either to have the value of this privilege reckoned up at the end of each fishing year, when it could be seen what had actually been done, or to have postponed the determination of the question until the experience of the whole twelve years, as matter of evidence, could be laid before the Commission.

What shall we say of the prospects of the ensuing seven years? What reason is there to believe that the business will suddenly be revolutionized; that there will be a return to the extraordinary prosperity, the great number of fish, and the large catches that are said to have been drawn from the Gulf twenty-five, twenty, fifteen years ago? We were told that the time for the revolution had come already, when we met here, but the result proves that the present season has been one of the worst for our fishermen. What chance can you see that a state of things will ensue that will make the privilege any more valuable for the seven years to come than it has been for the five years already passed?

Have you any right to assume that it is to be better without evidence? Have you any right, when you are obliged to judge of the future by the past, to go back to a remote past, instead of taking the experience of recent years? Would it be just for you to do so? This Commission, of course, does not sit here to be generous with the money of the Government of the United States, but simply to value in money what the citizens of the United States have under the treaty received, and are proved to be about to receive. It is, therefore, to be a matter of proof, of just such proof as you would require if you were assessing a charge upon each fishing vessel, either as it entered the Gulf or as it returned with its mackerel.

We think that there have been, heretofore, quite good standards by which to estimate the values of the inshore fisheries. For four years a system of licenses was enforced. In the year 1866, the license fee charged was only fifty cents a ton, except at Prince Edward Island, where it seems to have been sixty cents a ton. In 1867, it was raised to a dollar a ton, and \$1.20 at Prince Edward Island. In 1868, it was two dollars a ton, and \$2.40 at Prince Edward Island. The reason for the additional price on the Island I do not know; but it is not, perhaps, of much consequence. Our fishermen told you that the motive that induced them to take out these licenses was twofold. In the first place, they desired to be free from danger of molestation. In the next place, they did not desire, when there was an opportunity to catch fish within three miles of the shore, to be debarred from doing so; and if the license fee had remained at the moderate price originally charged, no doubt all of our vessels would have continued to pay the license, as they did the first year. Four hundred and fifty-four was the number of licenses the first year; but when the price was raised to a dollar a ton, half the number of vessels found it expedient to keep where they had always been allowed to go, to fish remote from the shore; even to avoid doubtful localities; to keep many miles out on the banks, rather than pay a sum that would amount, on the average, to \$70 a trip; and when the price was raised to two dollars a ton, hardly any of the vessels were willing to pay it. The reason why they would not pay it was not that they were contumacious and defiant. They were in a region where they were liable to be treated with great severity, and where they had experienced, as they thought,

very hostile and aggressive treatment. They desired peace; they desired freedom. They did not wish to be in a condition of anxiety. Neither the captains of the vessels on the sea, nor the owners of the vessels at home, had any desire to feel anxiety and apprehension. The simple reason why they did pay when it was fifty cents a ton and ceased to pay when it became one dollar, or two dollars a ton, was that the price exceeded, in their judgment, the value of the privilege. There were not mackerel enough taken within the inshore zone to make it worth their while to give so much for it. Whatever risk they were subjected to, what ever inconvenience they were subjected to from being driven off the shore, they preferred to undergo. If a license to fish inshore was not worth a dollar a ton in 1868 and 1869, in the haleyon days of the mackerel fishery, can anybody suppose it really is worth as much as that now? But fix the price of the license fee as high as you please. Go to this question as a question of computation, on business principles, pencil in hand; estimate how much per ton it is worth, or how much per vessel it is worth, and see to what result you are brought by the figures. Nobody thinks that for some years past there have been in the Gulf of St. Lawrence three hundred vessels from the United States fishing for mackerel. The average tonnage is put by no one at over 70 tons. That is about the average of Gloucester tonnage, and the vessels that come from Gloucester are larger than those that come from other places. Three hundred vessels at \$70 a vessel, \$21,000 per annum. Put whatever valuation you please per ton, and state the account; debit the United States with that, and see what the result is when you come to consider the duties. If it is called two dollars a ton, the highest price ever charged, it will be about \$42,000 a year.

Is there any prospect whatever that the mackerel fishery for American vessels in the Gulf of St. Lawrence will ever again become prosperous? In order that it should do so, there must concur three things, of no one of which is there any present probability. In the first place, there must be much poorer fishing off the coast of the United States than usual, for as things have been there for some years past until the present year, the fishing for mackerel was so much more profitable than it had ever been in the Gulf of St. Lawrence, that there was no temptation for our vessels to desert our own shores; and off the shores of the United States

seining can be pursued, which never has been successfully followed in the Gulf. Seining mackerel is about the only really profitable mode of taking the fish, as a business out of which money can be made to any considerable amount. The days for hook and line fishing have passed away, and seining is the method by which the fish must be taken, if money is to be made. That has never yet been done, and is not likely to be done, in the Gulf. The bottom is too rough, the water is too shallow. The expedient that we were told at the beginning of the hearing had been adopted turns out to be impracticable, for shallow seines alarm and frighten away the fish. The seines are not made shallow to accommodate themselves to the waters of the Gulf. Year by year they are made longer and deeper, that a school of fish may be more successfully enveloped by them. Then there must also be much better fishing in the Gulf than has existed for several years past. It has been going down in value every year since the Treaty went into effect. It has got down to an average, by the Port Mulgrave returns (I mean by the portion of the returns which we have) of 125 barrels a vessel this year, and according to the verbal statement of the Collector of Port Mulgrave, 108 barrels is quite up to the average. If any one takes the trouble to go through the returns we have put into the case and analyze them, it will appear that 108 barrels is quite as large as the average this year. Some vessels have come out of the Gulf with nothing at all, and some with hardly any thing at all. In the next place, in order to induce American vessels to go for mackerel to the Gulf of St. Lawrence in any considerable numbers, mackerel must have an active market, at remunerative prices. There must be a different state of things in the United States in that respect from what has existed for many years past, for by all accounts, the demand has been declining and the consumption has been diminishing for ten years past.

Without stopping to read at length the testimony on that point, there are two or three of the British witnesses who in a short compass state the truth, and to their testimony I wish to call your attention. Mr. Harrington, of Halifax, page 420, says, in answer to the question, "There has not been as much demand for mackerel from the United States for the last five years as formerly?" "Not so great." And in reply to the question, "There must be an abundant supply at home, I suppose?" he says, "I should say so, unless the people are using other articles of food." Mr. Noble,

another Halifax witness, page 420, being asked the same question, says, "I think for the past two years the demand for mackerel has not been quite so good as before." Mr. Hickson, of Bathurst, is asked this question, "Fresh fish are very rapidly taking the place of salt mackerel in the market, and the importance of salt mackerel and other cured fish is diminishing more and more every year. Is not this the case?" His answer is, "That is my experience in my district." "And owing to the extension of the railroad system and the use of ice cars, pickled, salt, and smoked fish will steadily become of less consequence?" "Certainly." Mr. James W. Bigelow, of Wolfville, Nova Scotia, on page 223 of the British evidence, states very emphatically the practical condition of the business. He says, "The same remark applies not only to cod fishing, but to all branches of the fishery — within the past ten years, the consumers have been using fresh instead of salt fish. The salt fish business on the continent is virtually at an end." He is sorry to say that he states this from practical knowledge of this business. He then goes on to say, that fish is supplied to the great markets of the United States, "from Gloucester, Portland, and New York; but from Boston principally." "And the fish is sent where?" "To every point West, all over the Union; the fish is principally boxed in ice." Then he goes on to state, that if the arrangements of the Treaty of Washington should become permanent, instead of being limited to a term of twelve years, with the new railroad communication with this city that has been already opened, the result will be to make Halifax the great fish-business centre of the continent; that the vessels will come in here with their fresh fish instead of going to Gloucester or Boston or New York; that a great business, a great city, will be built up here; and he says that, notwithstanding the Treaty is liable to terminate in seven years, he is expecting to put his own money into the business, and establish himself in the fresh-fish business here. Our own witnesses — the witnesses for the United States — have given a fuller and more detailed explanation of this change that has taken place in the markets. It requires no explanation to satisfy any person with the ordinary organs of taste, that one who can get fresh fish will not eat salt mackerel. Everybody knows that. *Crede experto.* Our witnesses tell you that fresh fish is sent as far as the Mississippi, and west of the Mississippi, in as great abundance as is to be found on the sea-board. It is just as easy to have fresh fish at

Chicago and St. Louis, and at any of the cities lying on the railroad lines one or two hundred miles west of the Mississippi, as it is to have fresh fish in Boston or Philadelphia. It is only a question of paying the increased price of transportation. Salt fish has to be transported there also, and it costs as much to transport the salt fish as the fresh fish. The result is, that people will not and do not eat salt fish nearly as much as formerly. Then there is a great supply of lake herring—a kind of white fish—from the northern lakes. The quantity is so great that the statistics of it are almost appalling, although they come from the most authentic sources. This lake herring, being sold at the same price as the inferior grades of mackerel—being sold often lower than the cheapest mackerel can be afforded—is taken in preference to it. People find it more agreeable.

At the South, where once there was a large mackerel demand usually, there has grown up an immense mullet business, both fresh and cured; that has taken the place of salt mackerel there. And so it has come to pass, that there is a very limited demand in a few large hotels for that kind of salt mackerel which is the best, the No. 1 fat mackerel,—a demand that would not take up, at the usual price in the market—\$20 a barrel—more than from five to ten thousand barrels all over the country; while, if you go down to the poorer grades of mackerel, few will buy them until they get as low as from seven to eight dollars a barrel. I am not going over the testimony of Proctor, Pew, Sylvanus Smith, and our other witnesses on this subject, because what they have said must be fresh in the minds of all of you. It comes to this: people will not eat the mackerel unless they can buy it at a very low price. It comes into competition, not with other kinds of fish alone, but with every description of cheap food, and its price can never be raised above the average price of other staples in the market of equivalent food-value.

If it is to be impossible to dispose of considerable quantities of these fish until the price is brought down to about eight dollars a barrel on the average, what inducement will there be to come, at great expense, to the Gulf of St. Lawrence, to have such results as for years past have followed from voyages here? The truth, gentlemen, is simply this: whether it is a privilege to you not to see United States vessels here, or whether their presence here has some incidental benefit connected with it, you are going to find

for years to come that they will not be here. The people in the Strait of Canso who want to sell them supplies will find them not there to buy supplies, and the unhappy fishermen who suffer so much from having them in the neighborhood of the Island will be exempt from all such evil consequences hereafter. Once in two or three years, if there appears to be a chance of a great supply here, and if there happens to be a great failure on our own coasts, a few of our vessels will run up in midsummer to try the experiment. But as to a large fleet of United States vessels fishing for mackerel in the Gulf of St. Lawrence, there is no immediate prospect that such will ever be the case. Forty years ago, fishing for mackerel died out in the Bay of Fundy. According to the witnesses, many years ago, mackerel were extremely abundant in the waters in the vicinity around Newfoundland. They have disappeared from all those places, though, strange to say, one schooner did get a trip of mackerel in a Newfoundland bay this summer, off the French coast, so that we are not obliged to pay for it in the award of this Commission: it was in waters where we had a right to fish before the Treaty of Washington. But this business, notoriously precarious, where no man can foretell the results of a voyage, or the results of a season, will pretty much pass away, so far as it is pursued by United States vessels. They will run out on our own coast; they will catch what they can and carry them to market fresh, and what cannot be sold fresh, they will pickle. They will, when the prospects are good, make occasional voyages here, but as for coming in great numbers, there is no probability that they will ever do it again. Our friends in Nova Scotia and upon the Island are going to have the local fishery to themselves. I hope that it will prove profitable to them. I have no doubt it will prove reasonably profitable to them, because they, living on the coast, at home, can pursue it under greater advantages than the men of Massachusetts can. They are very welcome to all the profits they are to make out of it, and they are very welcome, if they are not ungenerous in their exactions from us, to all the advantages they derive from sending the fish that they take in their boats or vessels in Nova Scotia and Prince Edward Island to our markets. All they can make by selling them there, I am sure no one will grudge them.

I come now to a branch of this case which it seems to me ought to decide it, whatever valuation, however extreme, may be put

upon the quantity of mackerel caught by our vessels in the territorial waters of the Provinces. I mean the duty question; the value of the remission of duties in the markets of the United States to the people of the Dominion. We have laid the statistics before you, and we find that in 1874 there was \$335,181 saved upon mackerel and herring, and \$20,791 more saved upon fish oil. There was, therefore, \$355,972 saved in 1874. In 1875, there was a saving of \$375,991 and some cents. In 1876, \$353,212. I get these figures by adding to the results of Table No. 4, which shows the importation of fish, the results of Table No. 10, which shows the fish oil. The statistics are Mr. Hill's. In Table No. 5, you will find the quantities of mackerel and herring. The dutiable value of mackerel was two dollars a barrel; of herring, one dollar a barrel; and of smoked herring, five cents a box.

We are met here with the statement that the consumer pays the duties; and our friends on the other side seem to think that there is a law of political economy as inexorable as the law of gravitation, according to which, when a man has produced a particular article which he offers for sale, and a tax is imposed on that article, he is sure to get enough more out of the man to whom he sells the article to reimburse the tax. That is the theory; and we have heard it from their witnesses,—“*the consumer pays the duties*,”—as if they had been trained in it as an adage of political economy. But, gentlemen, I should not be afraid to discuss that question, as applicable to mackerel and herring, and the cured fish that come from the Dominion of Canada into the United States, before any school of political economists that ever existed in the world. I do not care with what principles you start, principles of free trade or principles of protection, it seems to me that it can be proved by demonstration that this is a case where the duties fall upon those who catch the fish in the Dominion, and not upon the people of the United States who buy and eat them. The very treaty under which you are acting requires you to have regard to the value of the free market, ordains that in making up your award you shall take it into account. And are you, upon any theories of political economy, to disregard what the treaty says you shall have regard to? Why, nobody ever heard the proposition advanced, until we came here to try this case, that free access to the markets of the United States was any thing but a most enormous advantage to the people of these Provinces.

Let us look at the history of the negotiations between the two Governments on the subject. As early as 1845 (some years before the negotiations with reference to the Reciprocity Treaty), when the Earl of Aberdeen announced to Mr. Everett, as a matter of great liberality, that our fishermen were no longer to be driven out of the Bay of Fundy, he went on to say, that in communicating the liberal intentions of Her Majesty's Government, he desired to call Mr. Everett's attention to the fact, that the produce of the labor of the British Colonial fishermen was at the present moment excluded by prohibitory duties on the part of the United States from the markets of that country, and he submitted that the moment when the British Government made a liberal concession to the United States might well be deemed favorable for a kindred concession on the part of the United States to the British trade, by a reduction of the duties which operated so prejudicially to the interests of British Colonial fishermen. That was the view of the Home Government, long before any Reciprocity Treaty had been agitated,—thirty-two years ago. The letter of Lord Aberdeen bears date, March 10, 1845.

In 1850, a communication took place between Mr. Everett, then Secretary of State, through the British Minister at Washington, in which Lord Elgin made the offer to which I referred in my case, which I then understood to be an unequivocal offer to exchange free fish for free fishing, without regard to other trade relations. I found that, so far as that particular letter went, I was in error, and corrected the error. Subsequently, I found that Mr. Everett himself, two years later, had the same impression; for in a letter that he wrote, as Secretary of State to the President, in 1853, before the Reciprocity Treaty, he says:—

“It has been perceived with satisfaction that the Government of Her Britannic Majesty is prepared to enter into an arrangement for the admission of the fishing vessels of the United States to a full participation in the public fisheries on the coasts and shores of the Provinces (with the exception, perhaps, at present, of Newfoundland), and in the right of drying and curing fish on shore, on condition of the admission, duty free, into the markets of the United States, of the products of the Colonial fisheries; similar privileges, on the like condition, to be reciprocally enjoyed by British subjects on the coasts and shores of the United States. Such an arrangement the Secretary has reason to believe would be acceptable to the fishing interests of the United States.” (*32d Congress, 2d Session, Senate Ex. Doc. 34.*)

The latter part of that letter contains a reference to general reciprocity, and shows the anxiety of the British authorities to have more extensive reciprocal arrangements made.

MR. KELLOGG.—What is the date of Lord Elgin's letter?

MR. FOSTER.—The letter of Lord Elgin is dated June 24, 1851. The letter which I have just read from Mr. Everett to the President was in 1853. So that it seems that Mr. Everett then understood, as I did, that the offer was a specific one, and that the government of Great Britain was at that time disposed to exchange the right of inshore fishing for the admission of fish into the United States duty free. It is not particularly important, at a date so remote, how the fact really was. I refer to it only to show the great importance attached at that early day—an importance which has continued to be attached from that time to the present—by the Home Government as well as the Colonial Government, to free access to the markets of the United States.

Coming down to the date of the Reciprocity Treaty, we find in every direction, whatever public document we refer to of any of the Provinces, the same story told: That during the Reciprocity Treaty, they built up a great fish business, unknown to them before; that at the end of the Reciprocity Treaty, a duty of two dollars a barrel on mackerel and one dollar a barrel on herring excluded them from the markets of the United States and crushed out that branch of industry. At the risk of making myself tedious, I must read you some passages on that subject.

Here is what Mr. Peter Mitchell, the former Minister of Marine and Fisheries, says in 1869, in his "Return of all licenses granted to American fishermen," printed by order of Parliament, at Ottawa:—

"These excessive duties bear with peculiar hardship on our fishing industry, and particularly that of Nova Scotia and Prince Edward Island—the fishermen and dealers in those Provinces being forced into competition, in United States markets, under serious disadvantages, side by side with the American free catch taken out of our own waters."

Yes, "*taken out of their own waters.*" I am not afraid of the words. If the consumer pays the duties, it would not make any difference out of what waters the fish were taken, which brought on competition, would it? I am discussing now the proposition that there is a law of political economy, of universal application, and particularly applicable to the mackerel which go from the Provinces to Boston, by which whatever tax is imposed in the United States is forthwith added to the price and has to be paid by the man who eats the mackerel in the States, and it

makes no difference where the competition arises from. Mr. Mitchell's statement, therefore, is absolutely to the purpose. He continues:—

“At the same time, other producers are subjected to equally heavy charges on the agricultural, mineral and other natural products of the united Provinces.

“The direct extent to which such prohibitory duties affect the fishery interests of these Provinces may be stated in a few words. During the year 1866, for example, the several Provinces have paid in gold, as custom duty on Provincial-caught fish exported to the United States, about \$220,000.”

This amount was paid by the Provinces in 1866, the year after the Reciprocity Treaty ended. Then, in a note, he says:—

“More forcibly to illustrate the unequal operation of the present system, suffice it to instance the following cases:—A British vessel of 71 tons, built and equipped last season at St. John, N. B., costing \$4,800, expressly for the mackerel fishery in the Gulf of St. Lawrence and Bay of Chaleurs, took 600 barrels of fish, which sold in Halifax and Boston for \$6,000. After paying expenses (including \$9.86 in gold for customs) a profit of \$1,200 accrued to the owners. An American vessel from Newburyport, Mass., of 46 tons burthen, took a license at Port Mulgrave, N. S., paying \$46. The whole cost of vessel and voyage was \$3,200, or \$2,400 Halifax currency. She fished 910 barrels of mackerel, which sold in Boston for \$13,000, about \$9,110 in gold, leaving a profit of \$6,710.”

After speaking of the question of raising the license fee to higher figures, Mr. Mitchell continues (p. 6):—

“It is recommended that the rate be \$2 per ton, the mackerel fishery being that in which Americans chiefly engage, and as mackerel is the principal fish marketed in the United States by Canadians, on which the tax is \$2 per barrel, this rate amounts to a charge of but 20 cents per barrel, still leaving them an advantage of \$1.80 on each barrel, besides the drawback allowed on salt.”

Did Mr. Peter Mitchell think that the \$2 a barrel duty was got back by the fishermen of the Provinces? During the session of the Joint High Commission at Washington, when the American Commissioners made an offer to purchase the inshore fisheries in perpetuity, which was not coupled with any offer of free admission to our markets, the British Commissioners replied “that the offer was, as they thought, wholly inadequate, and that no arrangement would be acceptable of which the admission into the United States, free of duty, of fish, the production of the British fisheries, did not form a part.” And after the Treaty of Washington had been ratified, Earl Kimberley wrote to Lord Lisgar: “It cannot be denied that it is most important to the Colonial fishermen to obtain free access to the American markets for their fish and fish oil.”

You can explain the language of these statements only upon the theory that they knew and understood that the duty was necessarily a tax upon the fish production of the Provinces. How idle to have made observations of the kind that I have been reading except upon that plain hypothesis!

In the debates on the ratification of the Treaty, it was said by Sir John A. Macdonald that,—

“The only market for the Canadian No. 1 mackerel in the world is the United States. That is our only market, and we are practically excluded from it by the present duty. The consequence of that duty is, that our fishermen are at the mercy of the American fishermen. They are made the hewers of wood and drawers of water for the Americans. They are obliged to sell their fish at the Americans' own price. The American fishermen purchase their fish at a nominal value and control the American market. The great profits of the trade are handed over to the American fishermen or the American merchants engaged in the trade, and they profit to the loss of our own industry and our own people.”

And here let me call your attention to a striking fact, that from the beginning to the end of these negotiations, the people of the Maritime Provinces, who own the inshore fisheries, have been the people who have been most anxious on any terms to have the duties removed in the United States markets. It was said in this debate by some one (I do not remember the name of the speaker) that “it is harsh and cruel for the people of Ontario, for the sake of forcing a general Reciprocity treaty, to injure the fishing interests of the Provinces by preventing them from getting a free market in the United States.”

A gentleman from Halifax — Mr. Power — who is said to have devoted his whole life to the business, and to understand all about it, tells the story in a more practical way:—

“In the spring of each year, some forty or fifty vessels resorted to the Magdalen Islands for herring, and he had known the number to be greater. These vessels carried an average of 900 barrels each. So that the quantity taken was generally in the neighborhood of 50,000 barrels. During the existence of the Reciprocity Treaty, no United States vessels went after these fish. All the vessels engaged in that fishery belonged to some one of the Provinces now forming this Dominion. Since the abrogation of the treaty and the imposition of the duty of a dollar per barrel by the United States, the case had become entirely changed. Vessels still went there, but they were nearly all American. Now, under this treaty, we would get that important branch of the trade back again.”

You will remember that I said yesterday, gentlemen, that herring — a fish so poor and so cheap that American vessels can-

not afford to engage in the fishery, it is far more advantageous for them to purchase than to catch — would be, by a duty of a dollar a barrel, entirely excluded from the markets of the United States, and it seems that such was the result in the interval between the termination of the Reciprocity Treaty and the ratification of the Treaty of Washington. See how Mr. Power deals with this question of whether the consumer pays the duty.

“He had heard it said that the consumer paid the duty. Now, whilst this might be the case with some articles, it was not so with the article of our fish. In our case, in this business, our fishermen fished side by side with their American rivals, both carrying the proceeds of their catch to the same market, where our men had to contend against the free fish of the American fishermen. Let him illustrate this. An American and a Provincial vessel took 500 barrels of mackerel each; both vessels were confined to the same market, where they sold at the same price. One had to pay a duty of \$1,000, while the other had not to do so. Who then paid the \$1,000? Most certainly not the purchaser or consumer, but the poor, hard-worked fishermen of this Dominion; for this \$1,000 was deducted from his account of sales. Those who contend that in this case the consumer paid the duty, ought to be able to show, that if the duty were taken off in the United States, the selling price there would be reduced by the amount of the duty. There was nothing in the nature or existing circumstances of the trade to cause any person who understands to believe that this would be the case; and therefore it would be seen that at present our fishermen labored under disadvantages, which made it almost impossible for them to compete with their rivals in the United States; and that the removal of the duty, as proposed by this treaty, would be a great boon, and enable them to do a good business where they now were but struggling, or doing a losing trade.”

And the next speaker, after depicting in glowing terms just the condition of prosperity that the Island of Prince Edward is enjoying now, as a result sure to follow from the ratification of the treaty, goes on to say that no men can compete with the Provincial fishermen on equal terms, because their fishing is at their own door, and asserts that only an equal participation in the markets of the United States is necessary to give them the monopoly of the whole business.

Another speaker tells the story of the fleet of Nova Scotia fishing vessels built up under the Reciprocity Treaty, which were forced to abandon the fishing business when the Reciprocity Treaty ended and a duty was put upon fish. Somewhere I have seen it stated that vessels were left unfinished on the stocks when the Reciprocity Treaty terminated, because, being in process of construction to engage in the fishing business, their owners did not know what else to do with them.

Are we to be told that these men were all mistaken, — that the

consumer paid the duty all along,—that no benefit was realized to the Provincial fishermen from it? Why, even the reply to the British case concedes that when the duty existed, some portion of it was paid by the Provincial fishermen. It is to be remembered, too, gentlemen, that in considering this question of what is gained by free markets, you are not merely to take into account what in fact has been gained by the change, but the people of these Provinces have acquired, for a term of twelve years, a vested right to bring all descriptions of fish, fresh or salt, and fish oil, into our markets. Before the expiration of that time, the existing duties might have been increased in amount; duties might have been put upon fresh fish; there was nothing to prevent this, and there was every reason to anticipate that if a harsh and hostile course had been pursued towards American fishermen with reference to the inshore fisheries, there would have been duties more extensive and higher than ever before put upon every description of fish or fish product that could possibly go to the United States. They gained, therefore, our markets for a fixed term of years, as a matter of vested right. How much their industry has been developed by it, their own witnesses tell us.

Now, gentlemen, if you could consider this as a purely practical business question between man and man, laying aside all other considerations,—a question to be decided, pencil in hand, by figures,—does anybody in the world doubt which is the greatest gainer by this bargain, the people of this Dominion, having the free markets of the United States, or a few Gloucester fishermen catching mackerel within three miles of the shore, in the bend of the Island, or for a week or two off Margaree? Those are the two things.

But I am not afraid, gentlemen, to discuss this question upon abstract grounds of political economy. I said there was no school of political economy according to which there was any such rule as that the consumer paid the duties. I must trouble you with a few extracts from books on that subject, wearisome as such reading is. Here is what Andrew Hamilton said, one of the disciples of Adam Smith, as long ago as 1791:—

“If all merchants traded with the same rate of duty, they would experience the same general advantages and disadvantages; but if the rate of a tax was unequal, the inequality unavoidably operated as a discouragement to those whom the higher tax affected. If one merchant was charged two shillings for the same species and

quantity of goods on which another was charged only one shilling, it was evident that he who paid the highest duty must either lose the market, or smuggle, or sell his goods at an inferior profit. In other words, the difference in the rate of the tax would fall on the merchant liable to the highest duty, and in cases of competition would always drive him out of the market" (p. 187).

Then he goes on to say, on a subsequent page:—

"We may suppose a tax to be laid on in a department where, in the progress of wealth, profits were about to be lowered. If this tax was just equal to the reduction of the rate of profit that was about to take place, then common rivalry would induce the dealers to pay the tax and yet sell their goods as heretofore" (p. 217).

He says further, on page 242:—

"Let us suppose a brewer to have one thousand barrels of strong ale upon hand; that a tax of one shilling per barrel is laid upon the ale, and that he may raise the price just so much to his customers, because they will readily pay the tax rather than want the ale. In this case, the brewer would be directly relieved from the tax. But if, on the other hand, he found after advancing the tax he could not raise the price of his ale above what it was formerly, and yet was under a necessity of disposing of it, though this may drive him from the market or unite brewers to stint the supply, so as to bring up the price, on some future occasion, yet in the meantime the trader would suffer; nor would he immediately derive, by any of his ordinary transactions, an effectual relief from the loss he had thus sustained by paying the tax. When, therefore, a trader advances a tax upon a great quantity of goods, he can receive no effectual relief from such a tax, but in a rise of the price of the article, adequate to the tax which he has advanced."

"It follows that all speculations whose object is to show on what fixed fund or class taxes must fall are vain and unsatisfactory, and will be generally disproved (as they almost always have been) by experience." (p. 257.)

"A dealer who can evade such a tax will soon possess a monopoly if the tax is paid by his competitors. It will be to him a kind of bounty for carrying on his business, and this must drive his competitors either to evade the tax also or to relinquish the employment." (p. 288.)

I am almost disposed to hand to the reporters the extracts, rather than trouble you to read them; and yet I feel it my duty to press this subject, because, if I am right in it, it is decisive.

SIR ALEX. GALT.—I think you had better read them.

MR. FOSTER.—Mill says, and he is the apostle of free trade, in vol. 2 of his "Political Economy," page 113:—

"If the north bank of the Thames possessed an advantage over the south bank in the production of shoes, no shoes would be produced on the south side; the shoemakers would remove themselves and their capitals to the north bank, or would have established themselves there originally; for, being competitors in the same market with those on the north side, they could not compensate themselves for their

disadvantage at the expense of the consumer: the amount of it would fall entirely on their profits, and they would not long content themselves with a smaller profit, when by simply crossing a river they could increase it."

Apply that statement to the evidence in this case, and remember how, when the Reciprocity Treaty ended, the fishermen of Nova Scotia and Prince Edward Island took refuge on board United States vessels, for the purpose, as one of the official documents that I read from yesterday says, of evading the duty. It might be a curious question, if it were important enough to dwell upon it, whether, in assessing against the United States the value of the privilege of fishing inshore, you were or were not to take into account the fact, that half of the people who fish on shares in United States vessels are subjects of Her Majesty, and having disposed of their half of the fish, having paid half of the fish for the privilege of using the vessel and its equipment, they sell the other half of the fish, and bring the proceeds home; and whether it is a just claim against the United States if British subjects go in United States vessels, to require the United States to pay money because they do so.

Mill says in another passage, in vol 2, page 397:—

"We may suppose two islands, which, being alike in extent, in natural fertility and industrial advancement, have up to a certain time been equal in population and capital, and have had equal rentals, and the same price of corn. Let us imagine a tithe imposed in one of these islands, but not in the other. There will be immediately a difference in the price of corn, and therefore, probably, in profits."

I am almost through with this tediousness, but there is a good Scotch book on political economy by John McDonald, of Edinburgh, published in 1871,—and we have always had sound political economy from Scotland,—from which I must read a few lines:—

"In the third place," McDonald says, on page 351, "it may be possible to impose custom duties which will permanently be paid, either wholly or partly, not by the consumers, but by the importers or producers. Assume that we draw our stock of sugar from a country engaged in the growth of sugar, and capable of selling it with profit to us some shillings cheaper than any other country can: the former will of course sell the sugars to us at a price slightly below what would attract other competitors. Impose a duty of some shillings a cwt., without altogether destroying the peculiar advantages of the trade, while we will pay no dearer for our sugar, the importers will pay the tax at the expense of their profits. If we add to these considerations the difficulty of ascertaining the actual incidence

of many such taxes, distrust of sharp contrasts between direct and indirect taxes will be inspired."

"Customs duties sometimes fall on the importer, not on the consumer. And if this were a common occurrence, it might seriously impair the doctrine that protective duties are the taxing of the home consumer for the sake of the home producer. But this incidence is confined to the following rare circumstances: If the sole market open to the importer of the staple goods of one country is the country imposing the duties; secondly, if the other market open to him was so distant or otherwise disadvantageous that it would be preferable to pay the tax; or, thirdly, if the only available place for procuring commodities of vital moment to the importing country, was the country imposing the duty. Wherever the profits are such as to admit of a diminution without falling below the usual rate, it may be possible for a country to tax the foreigner." (p. 393.)

I was interested some years ago in an article that I found translated from the *Revue de Deux Mondes* of the 15th of Oct., 1869, on "Protection and Free Trade," by a gentleman of the name of Louis Alby. I do not know who he is, but on pages 40 and 41 of the pamphlet, he not only states the doctrine, but he illustrates it:—

"The free-traders believe—and this is the foundation of their doctrine—that when the import duty on an article of foreign merchandise is reduced, this reduction of taxes will at once cause an equal diminution in the price of the merchandise in the market, and an equal saving to the purchaser. In theory, this consequence is just, in practice, it never takes place. If the reduction is considerable, a part, and that far the smallest, profits the consumer; the larger portion is divided between the foreign producer and the several intermediaries. If the reduction is small, these last entirely absorb it, and the real consumer, he who makes the article undergo its last transformation, is in no wise benefited. The real consumer of wheat is neither the miller nor the baker, but he who eats the bread. The real consumer of wool is neither the draper nor the tailor, but he who wears and uses the clothes.

"This discrepancy between the variations of custom-house duties and the selling prices cannot be denied, and since the commercial treaty, the experiment has been tried. All prohibitions have been removed and all duties reduced; but what article is there the price of which has been sensibly lowered for consumption? When economists demanded the free importation of foreign cattle, they hoped to see the price of meat lowered, and for the same reason the agriculturists resisted with all their strength.

"As soon as the duties were removed, the graziers from the northern and eastern departments hasten to the market on the other side of the frontier; but the sellers were on their guard and held firm, and, competition assisting them, prices rose instead of falling; all the advantage of the reduction of duty was for foreign raisers of cattle, and meat is dearer than ever. The same result followed in reference to the wools of Algiers; and on this point I can give the opinion of the head of one of the oldest houses in Marseilles, an enemy, moreover, to protection, like all the merchants of seaport towns: 'When the duties on Algerian wools were removed,' he said to me, 'we supposed that this would cause wool to sell cheaper in France, but the contrary happened. There was more eagerness for purchasing in

Africa; there was more competition, and the difference in the duties was employed in paying more for the wool to make sure of getting it. *It is not, then, the French manufacturer who has profited by the removal of duties, it is the Arab alone.* Thus the interest of the consumer, about which so much noise is made, far from being the principal element in the question, only plays a secondary part, since the reduction in the tariff only profits him in a small measure."

Now, we are in a condition to understand precisely the meaning of what one of our witnesses said, Mr. Pew, that the price of mackerel to the man who bought one mackerel at a time, and ate it, had not changed for ten years; that it was a very small purchase; that the grocer who sold it to him would not lessen the price if mackerel went down, and would not raise the price if mackerel went up; that it kept to him uniform; so that, after all, the question has been a question where the greater or less profit accrued to parties who handled the mackerel.

If ever there was a case where it was impossible to transfer a duty once paid by a man who catches fish and brings it to market so that its incidence would fall on the consumer, it is the one we are dealing with. Why so? You cannot raise the price of mackerel very much, because its consumption stops when you get above \$8, or \$10 at the highest, a barrel. People will not eat it in larger quantities unless they are induced to do it because it is the cheapest procurable food. That is one reason why the duty cannot be put on to the price. There is another reason why it cannot be added to the price,—a perfectly conclusive one; and that is, that not more than one-fourth or a less part of the supply,—it has been assumed in the questions as one-fourth,—is imported and subject to the duty. I do not care what fraction it is, whether one-third, one-fourth, or one-fifth; not more than a small fraction of the mackerel that is in the markets of the United States at any time comes from the Provinces; and in order to get the price up to a point that will reimburse the Provincial fisherman who has paid a duty, you must raise the price of all the mackerel in the market, must you not? That is perfectly plain. If there are between three and four hundred thousand barrels of mackerel in the United States, and thirty, forty, fifty, sixty, seventy, eighty or a hundred thousand of them are taxed \$2 a barrel, do you think it is going to be possible to raise, by the tax on the Provincial catch, the price of the whole production in the market? If that could be done, it might come out of the consumer and then it would be a benefit to

our fishermen and an injury in the end to our consumers. But it cannot be done. The price cannot be raised ; the fraction is not large enough to produce any perceptible influence upon it. So the result has always been, and they know that it was so before and must be so again, that such a duty cuts down their profits to the quick. It cuts them down so that the business must be abandoned ; and take away the United States market, as you would take it away if a higher tariff was imposed, and the fishing business of the Provinces would gradually die out of existence. It is not the case,—let me repeat it, because there has been so much apparent sincerity in the belief that the tax would come out of the consumer,—it is not the case of a tax put upon the whole of the commodity, or the greater part of the commodity, but it is a tax put upon the smaller part of the commodity in the only market to which both producers are confined ; and you might just as well say, if two men made watches, one here and one in Boston, which were just exactly alike, and their watches were both to be sold in Boston, that you could put a tax of twenty-five or fifty per cent on the importation of the Halifax watch into Boston, and then raise the price.

The only instance in which the imposition of a tax upon a part of the production of an article results in raising the price of the whole is where the demand is active, where the supply is inadequate, and where there is no equivalent that can be introduced in the place of the taxed article. It might just as well be said that a wood lot ten miles from town is worth as much as a wood lot five miles from town. Wood will sell for a certain price ; and the man who is the farthest off, and who has the greatest expense in hauling the wood to market, is the man who gets the least profit.

It was estimated in the debates on the Treaty of Washington that the tax on mackerel at that time amounted to fifty per cent. It was truly stated to be a prohibitory duty. You will remember that Mr. Hall has also given you a practical view of this subject. Mr. Hall, Mr. Myrick, and Mr. Churchill, located on Prince Edward Island. To be sure, it is their misfortune not yet to be naturalized British subjects. Detract whatever you choose from the weight of their evidence, because they are Americans, but give to it as much as its intrinsic candor and reasonableness require at your hands. What do these gentlemen tell you of their practical condition ? Mr. Hall says that when the duties were put on, at

first, people on the Island were helped by a good catch, a good quality, and by a short catch in the United States, and by the condition of the currency ; but when they began to feel the full effect of the imposition of the duties, they were ruined. His partner confirms the same story. Mr. Churchill, the other man, whose business it is to hire by the month the fishermen of the Island, and pay them wages, says he could not afford to hire the men if a duty was put upon the fish. Do you suppose he could? The fish landed on the shore of Prince Edward Island are worth \$3.75 a barrel,—that is what they are sold for there. The fishermen earn for catching them from \$15 to \$25 a month. Put a tax of \$2 on to \$3.75 worth of mackerel, and can there be any doubt of the result?

If this subject interests you, or if it seems to you to have a bearing upon the result, I invite your careful attention to the testimony of Hall, Myrick and Churchill. Do they not know what the result of putting a tariff upon their mackerel would be? Do not the people of Prince Edward Island know? If they have been stimulated to a transient, delusive belief that they may, in some way, get the control of the markets of the United States for the eighty or ninety thousand barrels which, at the utmost, is produced in the Provinces, and put the price up as high as ever they please, do you not think that that delusion will be dissipated, and that their eyes will be most painfully opened, if it ever comes to pass that a duty shall be re-imposed?

It may be said that this question of duties is a question of commercial intercourse, and that it is for the benefit of all mankind that there should be free commercial intercourse, no matter whether one side gains and the other side loses or not; no matter where the preponderance of advantage is, we believe in untrammelled commercial intercourse among the whole human family. I am not at all disposed to quarrel with that doctrine. But that is not the case we are trying here. We are trying a case under a Treaty where there has been an exchange of free fish against free fishery ; and you are to say on which side the preponderance of benefits lies. We have no right, then, to indulge theories as to universal freedom of trade, because we are bound by a charter under which we are acting. You are to have regard to this question, so the Treaty says. Everybody has had regard to it since it first began to be agitated in both countries. Statesmen, public

writers, business men, — they have all considered it of the utmost consequence, and certainly this Commission, enjoined in the Treaty to have regard to it, are not going to disregard it and leave it out of consideration.

Now, am I not right in saying, that the whole value of whatever fish we catch in the territorial waters of these Provinces, when landed on the shores of the Provinces, or landed on the decks of our vessels, is of far less pecuniary magnitude than the direct pecuniary gain resulting from free importation into our markets? And that is a gain that is constantly increasing. Twice as large a quantity has gone from Nova Scotia and Prince Edward Island to Boston this year as went last year up to the same date, and making a moderate allowance for the vicissitudes of the business, and for one year being a little worse than another, there has been a continued development of the fishing business and fishing interests of these Provinces; and what has it sprung from? Do not these gentlemen understand the sources of their own prosperity? Do not they know, when they speak of the business having developed, that it is the market that has developed the business? They cannot eat their mackerel; they have too good taste to desire to eat them, apparently, after they are salted. The only place where they are able to dispose of them is in the United States. There is no evidence that the price of the fish has been lowered to the consumer by the circumstance that any more comes from the Provinces than did formerly, when the duty was imposed upon it. The price to the actual consumer has remained the same. If it could be shown that there has been a trifling reduction to the consumer, is that of any consequence compared with this direct and overwhelming advantage which the Provincials gain? Why, it is not only in this fish business that the control of the United States markets bears with such tremendous power upon the productions of the Dominion. In 1850, when the subject of reciprocity was being discussed, Mr. Crampton, then British Minister at Washington, requested Hon. William Hamilton Merritt, a Canadian of distinction, to prepare a memorandum on the subject, which I have here before me. He is speaking of the effect of duties in the United States on Canadian products generally. He says: -

"The imports from Canada since 1847 have in no instance affected the market in New York. The consumer does not obtain a reduction of prices: the duty is paid by the grower, as shown by the comparative prices on each side of the boundary, which have averaged in proportion to the amount of the duty exacted."

The Canadians, in their fishing industry, as I have said over and over again, have very great natural advantages over the fishermen of the United States in the cheapness with which they can build their vessels and hire their crews, and the cheapness of all the necessities of life. This increased cheapness is virtually a bounty upon the Canadian fisheries. It gives them the effect of a bounty as compared with United States fishermen. While there was a duty upon imported fish in the United States, it counteracted that indirect bounty. Now that the duty has been taken away, this immense development of the fishing interests of the Provinces, of which they are so proud, and of which they have said so much, has taken place; and out of this salt mackerel business it seems to me that they are quite sure eventually to drive the American fishermen. Everybody is going into the business, in Prince Edward Island, as their witnesses say. Out of three hundred fishermen from one port who used to be in our vessels and who have returned, hardly twelve are going back to the United States. They are going to have a monopoly of this branch of the fishing industry. It has been of great value to them; it will continue hereafter to be of greater value to them; and it is a value that no vicissitudes in the business are likely to take from them, because there is a certain quantity of mackerel which they will be able to catch near home which they can afford to sell in the markets of the United States at low prices, and from which they cannot fail to derive a very great and permanent advantage.

Gentlemen of the Commission, I have tried to make a business speech on a business question, and I shall spare my own voice and your patience any peroration. I hope I have established to your satisfaction that the exchange of the right to the inshore fisheries for the free markets of the United States leaves the preponderance of benefits and advantages largely on the side of the Canadians. Such certainly is the belief of the government and people of the United States. A declaration to that effect, that is, a declaration that no money award ought to be made, in our opinion is required by the evidence, and by every consideration of

justice. If this be so, the consequences are immaterial to us ; but I cannot refrain from saying, that though such a result might cause a little transient disappointment to a few individuals, it would, in my judgment, tend more than any thing else to establish the permanent relations between the United States and the Dominion of Canada on a footing of justice and peace, friendship and commercial prosperity. We are neighbors in geographical position, we are sprung from the same common origin, we speak the same language, have inherited the same literature, to a large extent have common traditions and history, we live under very similar laws and free institutions ; we are two great, free, energetic, prosperous countries, which cannot help respecting each other ; and though the surface may be occasionally for a short time ruffled to a trifling degree, yet in the depths of the hearts of the people of each country they entertain for each other a sincere and profound good-will.

